No. 04-980

Title:	Jill L. Brown, Warden, Petitioner v. Ronald L. Sanders
Docketed:	January 24, 2005
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(01-99017)
Decision Date:	July 8, 2004
Rehearing Denied:	October 13, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 11 2005	Petition for a writ of certiorari filed. (Response due February 23, 2005)
Jan 11 2005	Appendix of Jill L. Brown, Warden filed.
Feb 9 2005	Brief of respondent Ronald L. Sanders in opposition filed.
Feb 9 2005	Motion for leave to proceed in forma pauperis filed by respondent.
Feb 22 2005	Reply of petitioner Jill L. Brown, Warden filed. (Distributed)
Feb 23 2005	DISTRIBUTED for Conference of March 18, 2005.
Mar 21 2005	DISTRIBUTED for Conference of March 25, 2005.
Mar 28 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 28 2005	Petition GRANTED limited to Questions 1 and 3 presented by the petition.
Mar 31 2005	Motion to appoint counsel filed by respondent.
Apr 13 2005	Motion DISTRIBUTED for Conference of April 29, 2005.
May 2 2005	Motion to appoint counsel filed by respondent GRANTED. Nina Rivkind, Esq., of San Francisco, California is appointed to serve as counsel for the respondent in this case.
May 3 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 2, 2005.
May 31 2005	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jun 2 2005	Joint appendix filed.
Jun 2 2005	Brief of petitioner Jill L. Brown, Warden filed.
Jun 23 2005	Extension of time within which to file respondent's brief on the merits to and including July 22, 2005.
Jul 20 2005	CIRCULATED.
Jul 20 2005	SET FOR ARGUMENT on Tuesday, October 11, 2005.
Jul 22 2005	Brief of respondent Ronald L. Sanders filed. (Distributed).
Jul 29 2005	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Aug 24 2005	Application (05A193) to extend the time to file a reply brief from August

	26, 2005 to September 2, 2005, submitted to Justice O'Connor.
Aug 25 2005	Application (05A193) granted by Justice O'Connor extending the time to file the reply brief on the merits until September 2, 2005.
Sep 2 2005	Reply of petitioner Jill L. Brown, Warden filed. (Distributed)
Oct 11 2005	Argued. For petitioner: Jane N. Kirkland, Deputy Attorney General, Sacramento, Cal. For respondents: Nina Rivkind, Berkeley, Cal. (Appointed by this Court.)

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No. 04-980

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Under California's capital statutory scheme, in the guilt phase of trial, the sentencer determines whether "special circumstances" exist to make a defendant eligible for the death penalty. In a separate penalty phase, the jury considers and weighs a single list of eleven "open-ended" factors including, as one factor, "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." The factors are not labeled as aggravating or mitigating, but direct the jury's attention to relevant subject matter for the determination of sentence. The jury is required to impose the death penalty only if it is convinced that death is appropriate under all the factors even if aggravation outweighs mitigation.

1. Is the California death penalty statute a "weighing statute" for which the state court is required to determine that the presence of an invalid special circumstance was harmless beyond a reasonable doubt as to the jury's determination of penalty?

2. Was an affirmative answer to the previous question dictated by precedent pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), at the time the conviction in this case was final?

3. If an affirmative answer to the first question was dictated by precedent, was it necessary for the state supreme court to specifically use the phrases "harmless error" or "reasonable doubt" in determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

Petitioner Jill L. Brown, Warden of California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Ninth Circuit ordering the grant of habeas corpus relief with respect to the death sentence imposed on respondent is reported at 373 F.3d 1054. (Appendix A.) The opinion of the district court is unpublished. The opinion of the California Supreme Court affirming respondent's death sentence is reported at 51 Cal.3d 471. (Appendix C.)

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 8, 2004. A petition for rehearing and rehearing en banc was denied on October 13, 2004. (Appendix B.) This Court's

jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

California's capital sentencing scheme is set out, in relevant part, in California Penal Code section 190.3.

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

In 1981, Sanders and a confederate bludgeoned Janice Allen to death and nearly killed Dale Boender during a robbery, a few days after Sanders had botched a robbery on the same victims. In 1982, Sanders was convicted in Kern County, California, of murder, attempted murder, robbery, burglary, and attempted robbery, crimes he committed in 1981. The jury found that Sanders was eligible for the death penalty by finding four special circumstances true: the burglary special circumstance, the robbery special circumstance, the witness-killing special circumstance, and the especially heinous, atrocious and cruel murder special circumstance. Sanders was sentenced to death.

Sanders' conviction and sentence were affirmed in *People v. Sanders*, 51 Cal.3d 471 (1990). (App. C.) Although the California Supreme Court found the burglary-murder and especially heinous-atrocious-cruel special circumstances invalid, the court, relying on this Court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983), held the jury's consideration of those two invalid special circumstances as one part of the

aggravating and mitigating factors in sentence selection at the penalty phase was "benign" and there was "little chance" Sanders was prejudiced by it. (App. C at 72.) This case became final on May 28, 1991, when this Court denied certiorari on direct appeal. *Sanders v. California*, 500 U.S. 948 (1991).

The United States District Court for the Eastern District of California denied Sanders' petition for a writ of federal habeas corpus on August 24, 2001. (App. A at 8996.) The Ninth Circuit reversed and remanded the case to the district court with instructions to grant the writ as to the penalty phase unless the state granted a new penalty trial or imposed a penalty less than death. (App. A at 9017.)

The Ninth Circuit held: (1) that for purposes of evaluating the effect of an invalid aggravating factor on the penalty selection, California is a "weighing" state because the jury "must consider the defined list of aggravating factors and may not consider other aggravating factors in making its penalty determination"; (2) despite the invalid aggravators in Sanders' case, the California Supreme Court did not engage in a proper harmless error analysis for a weighing state since it did not use the words "harmless error" or "reasonable doubt" because it "erroneously" applied the rule for "non-weighing" states; and (3) the error was substantial and injurious under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

REASONS FOR GRANTING THE PETITION

I.

THE NINTH CIRCUIT'S CONCLUSION THAT CALIFORNIA IS A WEIGHING STATE IS NOT SUPPORTED BY SUPREME COURT AUTHORITY, AND IS CONTRARY TO CALIFORNIA'S VIEW OF ITS OWN STATUTE

The Ninth Circuit held that California is a "weighing" state and that the California Supreme Court did not sufficiently determine whether the invalidation of two special circumstances was harmless error. Although the Ninth Circuit purports to rely on this Court's decisions in *Zant v. Stephens*, 462 U.S. 862, *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Stringer v. Black*, 503 U.S. 222 (1992), its opinion in this case is a misapplication of those relevant decisions on the important federal question defining so-called "weighing" and "non-weighing" capital statutes and, in particular, analyzing the effect of invalid aggravating factors under California's death penalty law. Its opinion also conflicts with the California Supreme Court's resolution of this same federal question. U. S. Sup. Ct. Rule 10, subds. (c) and (a).

A. The Ninth Circuit's Holding In Contrary To This Court's Precedent

So far, in determining whether a death penalty remains valid following the striking of one or more aggravating factors, this Court has addressed state capital sentencing schemes which are clearly either "weighing" or "non-weighing." Weighing states use a structured categorical procedure of specifically labeled aggravating and mitigating circumstances. See *Zant*, at

890, and *Parker v. Dugger*, 498 U.S. 308, 318 (1991). [1]

The critical difference between a "weighing" and a "non-weighing" system is that if the sentencer considers an invalid aggravating factor, the state court in a weighing state, at a minimum, must determine "beyond a reasonable doubt" that the invalid factor did not affect the sentencer's verdict, even if there were other valid aggravators. In a non-weighing state, the state court need only assure itself that the invalid factor did not lead to the consideration of any irrelevant or inadmissible factors.

In the penalty phase in a weighing state, such as Mississippi, the jury must find the existence of at least one statutory aggravating factor to make the crime death-eligible, and then weigh that aggravating factor, and only that aggravating factor, against any mitigation to determine which penalty should be selected. *Stringer*, 503 U.S. at 229.

Non-weighing states, such as Georgia, do not use this categorical structure. The jury must find the existence of at least one statutory aggravating factor to make the crime death-eligible, but then the jury is instructed to take all the facts and circumstances of the case and the defendant into consideration in selecting the penalty, with the aggravating factor having no specific role in that process. *Stringer*, at 229-230.

In a weighing state, since the aggravating factor played a key role in sentence selection, an invalid aggravating factor is more significant than in a non-weighing state. A sentence based on an invalid aggravating factor cannot be automatically affirmed even though the sentencer weighed other valid aggravating factors. *Stringer*, at 230-231. A state court may cure the error by either reweighing the valid factors or finding the error harmless beyond a reasonable doubt. *Clemons*, 494

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1. While this Court has previously addressed the California capital statute, this Court has not determined whether California is a weighing or a non-weighing state. (But see *Tuilaepa v. California*, 512 U.S. 967, 981-984 (1994) (Stevens, J. conc.) (analogizing California law to Georgia law in *Zant*.)

U.S. at 750 and 753.

In a non-weighing state, an aggravating factor has no specific role in the selection process, and, therefore, if the evidence underlying the factor is otherwise properly before the jury, an invalid aggravating factor will not nullify the death penalty if the factor did not unduly affect the selection process or make the penalty arbitrary or capricious. *Zant*, 462 U.S. at 890.

California's statute fits neither of the categories of the statutes considered by this Court. During the guilt phase, special circumstances serve the narrowing function constitutionally required for determining death eligibility. *People v. Bacigalupo*, 6 Cal.4th 457, 468 (1993) (*Bacigalupo II*).

However, in the penalty phase, California's statute directs the jury to a "single" or "unitary" list of eleven "open-ended" sentencing factors which point the jury to relevant subject matter. *Tuilaepa*, 512 U.S. at 974-975. The special circumstances are relegated in that phase to being a subpart of one factor ("factor (a)") which includes "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding *and the existence of any special circumstances found to be true* [emphasis added]." Unlike "weighing" states, these factors are not divided into aggravating and mitigating categories. *Bacigalupo* II at 649; see also *Tuilaepa*, at 977, 979-980 . Both the prosecution and the defense may make far-ranging arguments about whether the defendant deserves the death penalty. *Tuilaepa*, at 979. The California factors impart to the jury a "full range of factors" as a "framework for the exercise of its discretion and can assist the jury in placing the particular defendant's conduct in perspective." *People v. Miranda*, 44 Cal.3d 57, 104 (1987). The California factors are similar to Georgia's, where the sentencer considers "all circumstances before it from both the guilt-innocence and the sentence phases of the trial [. . .which] relate to both the offense and the defendant." *Zant*, 462 U.S. at 872.

California law does limit the jury's consideration to the "specific factors listed in the statute," but the statute does not limit the jury's power to apply those factors as it chooses. *People v. Brown*, 40 Cal.3d 512, 544 (1985). California jurors are not restricted to weighing aggravation against mitigation. Rather, California juries may return a death verdict only if they conclude it is appropriate even if the aggravation outweighs the mitigation. *Bacigalupo II*, at 470.

On the other hand, California's single list of factors to be considered during the penalty selection phase effectively diminishes any concern that the mere labeling of facts of the offenses as "special circumstances" would impact the jury's determination in any significant way. *Tuilaepa*, at 974, 978, and 981-984 (Stevens, J., conc.). A California jury was not instructed to give any special weight or greater emphasis to multiple special circumstances. *Zant*, at 888, 890. Accordingly, the invalid labeling of otherwise relevant admissible evidence about the defendant's crime as a "special circumstance" does not add a forbidden thumb to "death's side of the scale." *Stringer*, 503 U.S. at 231.

The Ninth Circuit drew the wrong lesson from this Court's jurisprudence when it defined a weighing state in *Sanders* as one in which the "jury's sentencing discretion is not boundless–it must consider the defined list of aggravating factors, and may not consider other aggravating factors, in making its penalty determination." However, the possibility of an invalid aggravating factor does not necessarily distinguish a weighing from a non-weighing state. See *Tuggle v. Netherland*, 516 U.S. 10, 13-15 (1995) (reversal of penalty based on invalid aggravating factor in non-weighing state).[2]

The Ninth Circuit also misread California law since the

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2. While this Court's plurality opinion in *Barclay v. Florida*, 463 U.S. 939, 954 (1983) refers to Florida's prohibition of non-statutory aggravating factors, it does not indicate that that limitation is essential to its definition of Florida as a weighing state.

sentencer is *not* "restricted to a "weighing' of aggravation against mitigation." (App. A at 9000). The word "weigh," by itself is simply a metaphor for a mental balancing process and under California law is synonymous with "consider, take into account, and be guided by . . ." *Brown*, 40 Cal.3d at 541; *People v. Frierson*, 25 Cal.3d 142 (1979).[3/] California juries may return a death sentence only if they believe it appropriate even if aggravation outweighs mitigation.

The Ninth Circuit's simplistic conclusion that California is a weighing state conflicts with this Court's jurisprudence on what makes a state statute weighing or non-weighing. California is a non-weighing state.

B. The Ninth Circuit's Holding Is Contrary To The California Supreme Court's View Of Its Own State Statute

One of the considerations in granting certiorari is whether the federal court of appeals has "decided an important federal question in a way that conflicts with a decision by a state court

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3. The ubiquitous "weighing" metaphor even appears in discussions of the "non-weighing" Georgia statute, such as when this Court addressed whether jurors would give an aggravating circumstance any "greater" or "special weight." *Zant*, 462 U.S. at 888, 890. Georgia's "non-weighing" statutory language directs the sentencer "to consider any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory circumstances *which may be supported by the evidence*. . ." *Zant*, 462 U.S. at 865. Similarly, California directs that "the trier of fact shall take into account any of the following factors if relevant. . ." and reiterates "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section. . . ." Cal. Pen. Code, § 190.3. The terms "consider" and "take into account" and the decision whether something "outweighs" something else are virtually synonymous.

of last resort." U. S. Sup. Ct. Rule 10, subdivision (a). This case certainly meets that criterion. California has never viewed itself as a weighing state. Despite multiple opportunities to do so, the California Supreme Court has always instead focused on the aspects of the California death penalty statute that differentiate its capital sentencing scheme from that in a weighing state. See *Bacigalupo II*, 6 Cal.4th 457.

Following *Stringer*, this Court granted certiorari in *People v. Bacigalupo*, 1 Cal.4th 103 (1991) (*Bacigalupo I*), and remanded the case for further consideration in light of *Stringer*. *Bacigalupo v. California*, 506 U.S. 802 (1992). In its subsequent opinion, the California Supreme Court found that while the state scheme required juries to "weigh" aggravation and mitigation to reach a penalty determination, California is not a weighing state as described in *Stringer*. *Bacigalupo II*, 6 Cal.4th at 476. This Court denied certiorari. *Bacigalupo v. California*, 512 U.S. 1253 (1994).

The Ninth Circuit assumed in this case that the California Supreme Court's reliance, in Sanders' direct appeal, on *Zant*, which involved a non-weighing capital statute, instead of on the then-recent decision in *Clemons*, which involved a weighing capital statute, was inadvertent. (App. A 9003-9004) However, in light of the history and holdings in the *Bacigalupo* cases, it is clear that the California Supreme Court purposefully and correctly relied on *Zant* in delineating California's statute as a non-weighing statute and in assessing the impact of the invalid special circumstances on penalty selection in this case.

The California Supreme Court's citation to *Zant* in its opinion in this case and its continued reliance on *Zant* in subsequent cases when it clearly was aware of the *Clemons* and *Stringer* cases along with its citation to the *state law* standard for harmless error show the state supreme court has concluded California is a non-weighing state as a matter of Eighth Amendment law.

As this Court noted in *Stringer*, while relying on the Mississippi Supreme Court's view of its own death penalty law,

"It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law. [Citation.]" *Stringer*, 503 U.S. at 235.

For the foregoing reasons, California's capital sentencing scheme more closely resembles the Georgia scheme identified by this Court in *Zant* as a non-weighing scheme. Thus, the Ninth Circuit's decision in *Sanders* stands in direct conflict with both United States Supreme Court authority and with California Supreme Court authority interpreting its own statute (*Bacigalupo II*). Certiorari should be granted.

II.

THE NINTH CIRCUIT'S DECISION IN *SANDERS* CREATED NEW RULES WHICH CANNOT BE APPLIED RETROACTIVELY

The Ninth Circuit has held that applying the harmless error rule for invalid aggravating factors in "weighing states" to California's statute was not a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989). *Beardslee v. Brown*, ___F.3d ___ (2004) (No. 01-99007, filed Dec. 29, 2004). In *Beardslee*, in which this same issue was raised, the Ninth Circuit explained that "If *Teague* precluded relief in this case [*Beardslee*], it necessarily would have precluded relief in *Sanders*, which it did not." Thus, the Ninth Circuit has acknowledged that it decided the *Teague* issue as a "threshold question." *Goeke v. Branch*, 514 U.S. 115, 117 (1995). It is now properly presented to this Court in this petition for writ of certiorari, and this Court has the discretion to consider the issue. See, e.g., *Hopkins v. Reeves*, 524 U.S. 88, 93, n.3 (1998); *Schiro v. Farley*, 510 U.S. 222, 227 (1994); *Godinez v. Moran*, 509 U.S. 389, 397, n.8 (1993).[4]

It was objectively reasonable for the California Supreme Court to conclude that a federal constitutional standard did not apply to invalid special circumstances in the penalty phase of Sanders' case. When the case became final, both *Zant*, applying to non-weighing states, and *Clemons*, applying to weighing states, had been decided. This Court did not address whether California's statute made it a weighing state or non-weighing state or yet a third type. After Sanders' direct appeal was final, this Court decided *Stringer*, reiterating and explicating

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4. The State did not raise *Teague* in the Ninth Circuit. However, the Ninth Circuit has now explicitly ruled on the issue. The issue is significant since it relates to the Ninth Circuit's definition of a "weighing" state and it has the potential to affect, at a minimum, 20 or more California capital cases in which the California Supreme Court has invalidated a special circumstance.

Clemons.

As already noted, the California Supreme Court decided *Bacigalupo II* in light of *Stringer*, and concluded that *Stringer* did not speak to California's different statutory scheme. *Bacigalupo II*, 6 Cal.4th at 476.

The Ninth Circuit determined that California is a weighing state because it did not permit the jury to consider non-statutory aggravating factors. Nothing in *Clemons* or *Stringer* supports, much less compels, that conclusion. Indeed, all of the weighing state cases have involved the jury's consideration of vague "propositional" aggravating factors requiring a yes or no answer. *See Tuilaepa*, 512 U.S. at 974-75. These statutes also had specific aggravating *and* mitigating factors. None of this Court's cases has involved a scheme such as California's, in which the penalty jury is not required to answer a specific question, but rather is merely directed to a subject matter. *Id.* at 975. If anything, the California scheme more closely resembles the Georgia statute in *Zant*, which did not require harmless error review because of an invalid aggravating factor.

Since it was objectively reasonable for the California Supreme Court to conclude that a federal constitutional standard did not apply when a special circumstance was declared invalid, the Ninth Circuit's pronouncement that the California statute was a weighing statute was a "new rule" of constitutional law.

III.

CALIFORNIA PERFORMS ITS OWN HARMLESS ERROR ANALYSIS TO INVALID SPECIAL CIRCUMSTANCES AND DID SO IN THIS CASE

The Ninth Circuit compounded its mistake in this case by holding that the California Supreme Court's harmless error analysis was inadequate. Contrary to this Court's precedents, the Ninth Circuit imposed a requirement of formulaic pronouncement by the state court that error is harmless. *Jones v. United States*, 527 U.S. 373, 403-404 (1999). The Ninth Circuit ignored California state law when it faulted the California court for not using the words "harmless error" or "reasonable doubt."

Long before *Stringer* and *Clemons*, the California Supreme Court applied its own *state law* "reasonable possibility" harmless error standard in evaluating the impact of one or more invalid special circumstances on the sentence selection process. *People v. Allen*, 42 Cal.3d 1222, 1281 (1986). The California "reasonable possibility" standard is identical to the *Chapman* standard. See *People v. Jones*, 29 Cal.4th 1229, 1264 n.11 (2003) ["Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24."]

After thoroughly reviewing the record, the California Supreme Court explicitly applied its *Chapman*-equivalent standard in this case. App. C, 67-68, citing *People v. Silva*, 45 Cal.3d 604, 632-636 (1988) and *Allen* (both of which explicitly invoked the "reasonable possibility" test). Thus, it should make no difference that the state high court did not make any ritualistic recitations.

CONCLUSION

For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: January 6, 2005

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD L. SANDERS, *Petitioner-Appellant,* v. JEANNE S. WOODFORD, Warden, of California State Prison at San Quentin, *Respondent-Appellee.*	No. 01-99017 D.C. No. CV-92-05471-REC-P OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior Judge, Presiding

Argued and Submitted
February 12, 2004—Seattle, Washington

Filed July 8, 2004

Before: Dorothy W. Nelson, Andrew J. Kleinfeld and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

Nina Rivkind, Berkeley, California, and Eric E. Jorstad, Faegre & Benson, LLP, Minneapolis, Minnesota, for the petitioner-appellant.

Jane N. Kirkland, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

FISHER, Circuit Judge:

Convicted of murder and sentenced to death, Ronald Sanders appeals the district court's denial of his federal habeas petition, challenging both his conviction and his death sentence. We hold that the district court correctly rejected Sanders' claim that the jury that convicted him was drawn from a jury venire that unconstitutionally failed to reflect the number of Hispanics in Kern County, where he was tried. We conclude, however, that Sanders did not receive an individualized death sentence, as required by the Eighth Amendment. The California Supreme Court neither independently reweighed aggravating and mitigating sentencing factors after it had invalidated two of the aggravating factors, nor did it conduct an appropriate harmless-error analysis. We also conclude that this error was not harmless. We therefore reverse the district court's denial of Sanders' habeas petition as it relates to the imposition of the death penalty and remand with instructions to grant the petition if the state does not either provide a new penalty trial or replace the sentence of death with another legally appropriate punishment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Sanders was found guilty of murdering of Janice Allen. According to the state, the murder arose out of an escalating dispute between Allen's boyfriend, Dale Boender, who was a drug dealer, and two of Boender's customers, Brenda Maxwell and her aunt Donna Thompson.

In 1980, Boender dealt cocaine around Bakersfield, California. Maxwell was one of his customers, as was Thompson. Boender had stopped selling cocaine to Maxwell because she owed him money. As for her aunt, she felt that Boender had "burned her" in a drug transaction. So — as Maxwell testified — she, Thompson, and Sanders hatched a plan to rob Boender and steal his cocaine. The plan was to lure Boender to Maxwell's home, have Sanders — whom Boender did not know — attack and rob Boender, and then have Sanders bind and "rob" Maxwell to make her look innocent of the set-up. Thompson would later "discover" and free both Boender and Maxwell.

[1]We take our factual statements from the California Supreme Court's opinion in *People v. Sanders*, 51 Cal. 3d 471 (1990).

On the morning of January 21, 1981, Maxwell called Boender, asking him to come to her house with a large amount of cocaine. Boender went to Maxwell's home accompanied by Allen. Upon arriving, Boender was attacked with a piece of a pool cue by a man whom he had never seen before, but whom Boender later identified as Ronald Sanders. The robbery, however, did not go according to plan. Boender gained the upper hand over Sanders and left with the drugs. By that time, Allen had already fled the scene.

Immediately after the botched robbery, Maxwell feared that Boender would realize he had been set up, and (according to Maxwell) Sanders also feared Boender could identify him. Maxwell, Thompson and Sanders went by the house of another person, John Cebreros, to enlist his help. The group then went to Thompson's house, where Maxwell called mutual friends of hers and Boender's to tell them she had been robbed and raped so as to enhance her claim that she had been victimized along with Boender.

The next Friday evening, after drinking wine and smoking marijuana with friends, Boender and Allen bought groceries and returned to their apartment. While they were preparing dinner, there was a knock at the door. Leaving Allen in the kitchen, Boender went to the front door and opened it, encountering Sanders and a man he later identified as Cebreros (whom Boender had not seen before). Sanders spun Boender around and pushed him to the floor, face down. Allen emerged from the kitchen and was also made to lie on the floor. Boender's glasses were ripped from his face and both he and Allen were bound and blindfolded.

Boender testified that the assailants asked for his cocaine and his money. He heard the assailants rummaging around his apartment. One of the assailants dragged him to what seemed like his bedroom and left the room. He heard more footsteps, muffled talking and more banging around the apartment. Boender heard one of the assailants say that he wanted to

leave, but heard the other say that he wanted to stay. Boender could not identify the speaker who wanted to leave. Boender then heard someone approach, felt a blow to the head and recalled nothing further.

Later that night, Boender's roommates returned to the apartment and found it full of smoke from a pot left on the stove. They discovered Boender in his bedroom, lying in a pool of blood. After calling an ambulance, they noticed that the apartment was in disarray, there were spots of blood around and a bag of marijuana was missing. One roommate found Allen's body in another bedroom and called the police.

Both Boender and Allen had been bound by lengths of electrical cord cut from a vacuum cleaner. Allen sustained a fatal head wound from a heavy, blunt object which fractured her skull and lacerated her brain. Boender suffered a skull fracture but was conscious when the police arrived. Maxwell, Sanders and Cebreros were originally arrested, but Maxwell was released and granted immunity in return for her testimony.

Sanders and Cebreros were tried jointly. As the state acknowledged at trial, there was no direct evidence that determined whether Sanders or Cebreros had killed Allen. The most important witnesses for the prosecution were Boender and Maxwell; Boender identified Sanders from the robbery and Maxwell implicated Sanders in the plot to rob or murder Boender.

The defendants challenged Boender's identification and presented an alibi defense. Three defense witnesses testified that on the night of the murder, both Sanders and Cebreros were at the home of Cebreros' brother, Salvador, talking, playing chess and drinking beer. No physical evidence was found at the murder scene to link Sanders or Cebreros to the murder.

The first trial of the co-defendants resulted in a hung jury. On January 22, 1982, after a retrial, both Sanders and

Cebreros were convicted of robbery, burglary, attempted murder of Boender and first degree murder for the death of Allen. For both defendants, the jury found to be true four of the "special circumstances" that are necessary under California law for the imposition of the death penalty after a murder conviction.

At the penalty phase, for reasons that are unclear from the record, the prosecution waived its right to seek the death penalty for Cebreros but decided to seek death for Sanders. Sanders instructed his counsel that he did not want to present any evidence or argument at the penalty phase, because (as he told the trial court at the time) he felt that both life in prison and death were "equally unacceptable" sentences. Apparently because of these instructions, Sanders' counsel did not pursue a thorough investigation into potential mitigating evidence. He presented no evidence of mitigating circumstances and gave no argument whatsoever to the jury at the penalty phase.

The state argued only one aggravating circumstance to the jury at the penalty phase — namely, that Sanders had committed five armed robberies in Orange County, California, in 1970, to which several witnesses testified. Sanders had been convicted for these robberies, pled guilty, served time in state prison and, in 1973, was granted parole, from which he had been removed in 1980. After hearing the prosecution's penalty evidence and argument, the jury returned a verdict of death after deliberating for about two hours over two days.

As discussed in more detail below, on automatic appeal, the California Supreme Court invalidated two of the four special circumstances found by the jury in convicting Sanders. The California Supreme Court upheld the conviction and sentence in all other respects, and the United States Supreme Court denied certiorari.

On December 20, 1993, Sanders filed his first federal petition for a writ of habeas corpus in the district court. The district court ordered Sanders to exhaust state remedies, which he proceeded to do. Sanders then filed an amended petition in the district court, which denied the petition in its entirety on August 24, 2001. We granted Sanders a certificate of appealability on several of his claims on July 30, 2002.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over Sanders' habeas petition under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 1291. Because Sanders filed his habeas petition before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996, AEDPA does not apply. *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003). The district court's decision to deny relief is reviewed de novo. *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Factual findings made by the district court are reviewed for clear error. *Alcala*, 334 F.3d at 868.

DISCUSSION

We first address Sanders' challenge to the imposition of the death penalty, and then discuss his challenge to his conviction.

I. Sentencing Error

[1] In assessing whether a death sentence satisfies the Eighth Amendment's prohibition on cruel and unusual punishment, a "primary concern . . . has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990). "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more

important than in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

[2] A serious concern about whether a death sentence is truly individualized arises when a jury decides to impose a death sentence based on its own assessment of aggravating and mitigating factors, and an appellate court later declares some or all of those aggravating factors legally invalid. Later invalidation of aggravating factors may undermine a jury's original calculus for imposing death, introducing the risk that a defendant in such cases will not receive "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 494 U.S. at 752; *see also Stringer v. Black*, 503 U.S. 222, 230-31 (1992). Moreover, "[e]mploying an invalid aggravating factor in the weighing process creates the possibility of randomness, by placing a thumb on death's side of the scale, thus creating the risk of treating the defendant as more deserving of the death penalty." *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (internal quotation marks, citations and alterations omitted).

[3] The Supreme Court has set out clear rules for the procedures appellate courts must follow when an aggravating factor has been held invalid. *See id.* at 532. The procedures differ significantly between so-called "weighing" and "nonweighing" states. In nonweighing states, aggravating factors matter for determining eligibility for the death sentence, but have no specific function in the sentencing process itself. At sentencing in nonweighing states, the factfinder always takes into consideration all circumstances from both the guilt and the sentencing phases of the trial. *See Stringer*, 503 U.S. at 229-230. Thus, in these states, as long as the jury finds that at least one aggravating factor makes the defendant death-eligible, the subsequent elimination of another aggravating factor does not pose a problem for individualized sentencing, because the aggravating circumstances are not considered as separate factors in sentencing. *See Zant v. Stephens*, 462 U.S. 862, 889

(1983); *Williams v. Calderon*, 52 F.3d 1465, 1479 (9th Cir. 1995) (holding that California's pre-1978 death penalty system was nonweighing).

[4] In contrast, in weighing states — including, as we explain below, California after 1978 — "the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances." *Clemons*, 494 U.S. at 745. In these states, "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." *Sochor*, 504 U.S. at 532.

A remand for resentencing is not necessarily required, however, in order to correct this error. In weighing states, when a jury has made the sentencing determination, state appellate courts that have declared an aggravating factor invalid in a capital case have three options. They may either: (1) remand for resentencing; (2) independently reweigh the remaining aggravating and mitigating circumstances under the procedure set forth in *Clemons*, in which the "state appellate court reweighs aggravating and mitigating circumstances that have already been found by a jury to exist," *Valerio v. Crawford*, 306 F.3d 742, 757 (9th Cir. 2002) (en banc); or (3) independently conclude that the sentencing body's consideration of the invalid aggravating circumstance was "harmless beyond a reasonable doubt" under the standard elaborated in *Chapman v. California*, 386 U.S. 18, 23 (1967). *See Morales v. Woodford*, 336 F.3d 1136, 1147 (9th Cir. 2003). "While federal law does not require the state appellate court . . . to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error." *Sochor*, 504 U.S. at 532.[2]

[2]In *Valerio* we concluded that another method of appellate curing of unconstitutional error in sentencing instruction — the combination of a narrowing construction of the improper instruction and de novo appellate review described in *Walton v. Arizona*, 497 U.S. 639 (1990) — is not available when the penalty phase factfinder is a jury. 306 F.3d at 758.

Even if a state appellate court has not adhered to these principles and thus failed to ensure constitutionally adequate sentencing, such an error does not automatically mean that a petitioner will receive habeas relief in federal court. Rather, in habeas cases, we apply a second level of harmless-error review in order to determine whether the state court's failure to conduct the constitutionally mandated review was itself harmless. *See Morales*, 336 F.3d at 1148. In doing so, we apply the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), which requires us to determine whether, in light of the record as a whole, the error had substantial and injurious effect or influence in determining the jury's verdict. *Morales*, 336 F.3d at 1148.

In Sanders' case, the California Supreme Court invalidated two of the "special circumstances" that the jury had found at the guilt phase and was required to weigh in deciding whether to impose a death sentence. *See* Cal. Penal Code 190.3(a) (West 2003) (stating that a sentencing jury shall take into consideration if relevant "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to [Cal. Penal Code] Section 190.1"). Sanders claims that he is entitled to relief because after invalidating these two special circumstances, the California Supreme Court neither remanded for resentencing nor conducted an independent reweighing or a proper harmless-error analysis. For Sanders to prevail on this claim, he must demonstrate (1) that California is a weighing state; (2) that the California Supreme Court did not conduct a proper review; and (3) that the failure to conduct such a review, in light of the record as a whole, had a substantial and injurious effect on his sentencing. We hold that Sanders has met all three of these requirements.

A. California's Death Sentencing System

We have indicated that California's post-1978 death penalty law created a "weighing" system. *See Allen v. Woodford*,

366 F.3d 823, 857 (9th Cir. 2004). We have not, however, explained precisely how the weighing of sentencing factors operates under California law. Because specific features of California law are important to our ruling here, we shall do so now.

We consider a state death penalty regime to be a weighing system when "the sentencer [is] restricted to a 'weighing' of aggravation against mitigation" and "the sentencer [is] prevented from considering evidence in aggravation other than discrete, statutorily-defined factors." *Williams v. Calderon*, 52 F.3d 1465, 1477 (9th Cir. 1995).[3] Both of these elements are present under California's post-1978 system. California Penal Code § 190.3 specifies that the sentencing jury in a capital case "shall take into account . . . if relevant" any of 11 factors. The trier of fact "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." Cal. Penal Code § 190.3. The California Supreme Court has expressly interpreted § 109.3 as precluding the jury from considering aggravating factors other than those statutorily defined. *People v. Boyd*, 38 Cal. 3d 762, 773 (1985) ("By . . . requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the [post-1978 death penalty law] necessarily implie[s] that matters not within the statutory list are not entitled to any weight in the penalty determination.").

[3]We note that *mitigating* evidence, unlike aggravating evidence, *may not* be confined to discrete, statutorily defined factors, because "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *see also Belmontes v. Woodford*, 350 F.3d 861, 898 (9th Cir. 2003) (interpreting California Penal Code § 190.3(k) as satisfying this requirement within California's death penalty scheme).

Thus, as we have previously indicated, it is clear that California's post-1978 death penalty system is a weighing system. *See Allen*, 366 F.3d at 857.

We note, however, that California's system has features that are not present in all weighing states, and that are important for understanding the effect of the invalidation of the special circumstances in Sanders' case. A death penalty trial in California proceeds in two stages. At the initial phase of the trial, when the trier of fact decides the issue of the defendant's guilt or innocence, "a determination must be made as to the existence of any 'special circumstances.' " *People v. Bacigalupo*, 6 Cal. 4th 457, 467 (1993). Special circumstances found at the guilt phase serve to make a defendant eligible for the death penalty, and are thus the "criteria in the California capital scheme that define the class of murders for which death is a potential penalty." *Id.* at 467-68.

The weighing of factors under § 190.3 becomes relevant only at a subsequent "penalty" or sentencing phase that occurs once the defendant has been found death-eligible during the guilt phase.

> At this stage in the proceedings, additional evidence may be offered and the jury is given a list of relevant factors . . . to guide it in deciding whether to impose a sentence of life without the possibility of parole or a sentence of death. . . .
>
> With the exception of section 190.3's factor (k), which invites consideration of any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, the statute does not explicitly designate any of the factors as exclusively aggravating or exclusively mitigating. It simply directs the trier of fact to aspects of the offense and the defendant's background that are relevant to the penalty determination.

Id. at 814 (internal citation, quotation marks and alterations omitted). Although the statute plainly instructs that the fact-finder "shall" at this stage impose death if it finds that the aggravating circumstances outweigh the mitigating ones, "[t]his weighing is a process that by nature is incapable of precise description." *Id.* at 470 (internal quotation marks omitted); *see also People v. Brown*, 40 Cal. 3d 512, 541-45 (1983), *reversed on other grounds by California v. Brown*, 479 U.S. 538 (1987).

> The weighing of aggravating against mitigating circumstances is a mental balancing process, but not one that involves a mechanical counting of factors on either side of some imaginary scale, or the arbitrary assignment of weights to any factor. Rather . . . a juror faced with making the requisite individualized determination whether a defendant should be sentenced to life without parole or to death is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to each and all of the relevant factors.

Bacigalupo, 6 Cal. 4th at 470 (internal quotation marks and citations omitted); *see also Allen*, 366 F.3d at 855.

Thus, under California law, when a jury decides whether to impose the death penalty, it does more than merely count aggravating and mitigating factors, and individual jurors may ascribe varying weight to any single aggravating factor. This makes it difficult for an appellate court that later reviews the jury's sentencing decision to surmise what weight the jury gave to a particular factor.

Nonetheless, California still qualifies as a weighing state, because the jury's sentencing discretion is not boundless — it must consider the defined list of aggravating factors, and may not consider other aggravating factors, in making its penalty determination. Therefore, an appellate court's invalida-

tion of one or more of the sentencing factors may have a serious effect on individualized sentencing, because there is a real risk that the jury's decision to impose the death penalty rather than life imprisonment may have turned on the weight it gave to an invalid aggravating factor. With this sentencing structure in mind, we turn to the California Supreme Court's affirmance of Sanders' death sentence in light of its invalidation of two of the aggravating factors the jury considered.

B. The California Supreme Court's Affirmance of the Death Sentence

The jury found to be true four special circumstance allegations against Sanders: (1) that the murder was committed while he was engaged in a robbery (*see* Cal. Penal Code § 190.2(a)(17)(A)); (2) that it was committed while he was engaged in a burglary (§ 190.2(a)(17)(G)); (3) that Allen was killed to prevent her testimony (§ 190.2(a)(10)); and (4) that the murder was heinous, atrocious and cruel (§ 190.2(a)(14)). *People v. Sanders*, 51 Cal. 3d 471, 515 (1990). The California Supreme Court invalidated the burglary special circumstance because the jury could have found the requisite mental state for burglary based on Sanders' intention to commit assault, not a murder, and then have impermissibly merged the burglary with the murder to create the burglary-murder special circumstance. *Id.* at 517; *see also People v. Wilson*, 1 Cal. 3d 431, 441 (1969) (rejecting "bootstrapping" of burglary and felony-murder). The court also set aside the heinous-murder special circumstance because in a prior opinion it had found that special circumstance to be unconstitutionally vague. *Sanders*, 51 Cal. 3d at 520; *see People v. Superior Court (Engert)*, 31 Cal. 3d 797 (1982).

The California Supreme Court issued its decision shortly after the United States Supreme Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and before the Court's decision in *Stringer v. Black*, 503 U.S. 222, 230 (1992). Thus, perhaps understandably, the California court did not follow

the procedures constitutionally mandated for appellate review in a weighing state where an aggravating circumstance has been invalidated. The California court did not remand for resentencing. It also did not independently reweigh the aggravating and mitigating factors to ensure an individualized sentence. The state does not argue otherwise.

Although the California court did apparently conduct some type of harmless-error analysis, it did not find, as it was required to do, that the error was "harmless beyond a reasonable doubt." *See Morales*, 336 F.3d at 1147-48. The court first focused on the heinous-murder special circumstance and its effect on the jury in light of the prosecutor's closing argument. The court observed, "Although the prosecutor mentioned the heinous-murder special circumstance in closing argument, he did not heavily rely on it." *Sanders*, 51 Cal. 3d at 521. It concluded, "[A] reasonable juror would not have been swayed by abstract concepts of heinous, atrocious or cruel . . . but would instead have focused on the actual circumstances of the offense which formed the foundation for finding those special circumstances to be true." *Id.* (internal quotation marks and alterations omitted). Then, the court turned to the burglary-murder special circumstance, noting that "the prosecutor did not focus on the bare number of special circumstance findings but urged the jury to consider the brutality of the crimes." *Id.* It determined that "there was little chance defendant was prejudiced by consideration of the burglary-murder special circumstance." *Id.*

[5] We cannot uphold a state appellate court's harmless-error review as adequate when we have substantial uncertainty about whether the state court actually concluded that the invalid aggravating factor was harmless beyond a reasonable doubt. In *Sochor v. Florida*, 504 U.S. 527 (1992), a state trial court in Florida had found four aggravating circumstances and no circumstances in mitigation.[4] *Id.* at 530. The

[4]In Florida, the weighing is done by a judge with an advisory jury verdict. *See Sochor*, 504 U.S. at 529-30.

Supreme Court of Florida invalidated one of the aggravating circumstances — the "cold, calculated, and premeditated manner" circumstance — because this factor required a "heightened" degree of premeditation that was not supported by the evidence in the case. *See id.* at 531. Despite the error, the Florida court affirmed the death sentence and said:

> The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991). The United States Supreme Court concluded that the Supreme Court of Florida had not adequately performed a harmless-error review. The Court noted that the state court failed "so much as to mention 'harmless error.' " *Sochor*, 504 U.S. at 539-40. It also pointed out that "[o]nly one of the four cases [cited by the Florida court] contains language giving an explicit indication that the State Supreme Court had performed harmless-error analysis. The other three simply do not, and the result is ambiguity." *Id.* at 540 (citation omitted). The Court thus held, "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error 'was harmless beyond a reasonable doubt' in that 'it did not contribute to the [sentence] obtained, *Chapman*, [386 U.S. at 24,] the error cannot be taken as cured by the State Supreme Court's consideration of the case." *Sochor*, 504 U.S. at 540.

[6] The California Supreme Court's review in this case is similar to the Florida Supreme Court's review in *Sochor*. The California court never used the words "harmless error" or "reasonable doubt" in analyzing the effect of removing the special circumstance. Moreover, it appears that the California court erroneously believed that it could apply the rule of *Zant v. Stephens*, 462 U.S. 862 (1983) — which is applicable only to nonweighing states — and uphold the verdict despite the invalidation of two special circumstances because it was upholding other special circumstances. *See Sanders*, 51 Cal. 3d at 520 ("The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors [citing *Zant*], and this court is in accord."). In these circumstances, we cannot conclude that the California Supreme Court found that the invalidation of the special circumstance was harmless beyond a reasonable doubt. *See Clemons*, 494 U.S. at 754 ("It is perhaps possible . . . that the Mississippi Supreme Court intended to ask whether beyond a reasonable doubt the result would have been the same . . . . Because we cannot be sure which course was followed in Clemons' case, however, we vacate the judgment insofar as it rested on harmless error . . . ."). We therefore hold that Sanders did not receive the individualized death sentence to which he was entitled because the California Supreme Court did not conduct an adequate, independent appellate review.

C. Substantial and Injurious Effect

[7] Before Sanders is entitled to habeas relief, however, we must also apply our own harmless-error analysis to determine whether the Eighth Amendment error had a substantial and injurious effect or influence on the jury's verdict. "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (internal quotation marks omitted).

Morales v. Woodford, 336 F.3d 1136 (9th Cir. 2003), another federal habeas case involving California's post-1978

death-penalty law, provides a point of contrast. In that case, applying *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), we found harmless an invalid special circumstance weighed by the jury in the penalty phase, where the jury also relied on another valid special circumstance in deciding to impose the death penalty. The invalid special circumstance required the jury to find that "the murder involved the infliction of torture" (defined as "the infliction of extreme pain"). *Morales*, 336 F.3d at 1145 & n.20 (internal quotation marks omitted). However, the special circumstance did not require the jury to find that the defendant intentionally tortured the victim. *Id.* Applying our prior caselaw, we held that special circumstance constitutionally invalid because the unintentional infliction of extreme pain might "have nothing to do with the mental state or culpability of the defendant and would not seem to provide a principled basis for distinguishing capital murder from any other murder." *Id.* at 1146; *see also Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir. 1994) (invalidating this special circumstance), *overruled on other grounds*, *Rohan* ex rel. *Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003).

Despite this legal conclusion, we noted that the facts strongly suggested that the defendant had tortured the victim and that he had done so intentionally. "There [was] no reason to doubt that after [the defendant] failed to kill [the victim] by strangling her with [a] belt, he beat her head in with a hammer, and when she still lived, dragged her out of the car, raped her, and stabbed her several times." *Morales*, 336 F.3d at 1149. Given this "overwhelming" evidence, the jury would have reached the unavoidable conclusion that the defendant intended to inflict extreme pain on the victim as part of the murder. *Id.* Because we did not doubt in *Morales* that the jury in fact *did* find that the defendant intended to torture the victim, we concluded that the constitutional error had no substantial or injurious effect on the defendant's sentencing.

[8] Here, in contrast, the jury likely considered the legally improper aspects of the invalid special circumstances. The

jury could well have relied on the vague language in the heinous-murder instruction in finding the murder "heinous, atrocious, and cruel." The facts do nothing to cure the problem with this special circumstance, because the terms of that circumstance are " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *People v. Superior Court (Engert)* 31 Cal. 3d 797, 801 (1982) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

[9] The jury also easily could have considered the improper aspect of the burglary-murder special circumstance. According to the California Supreme Court, the flaw in the burglary-murder special circumstance was that the trial court's felony-murder jury instructions during the guilt phase had "improperly permitted the jury to find a burglary based on [Sanders'] intent to commit an assault." *Sanders*, 51 Cal. 3d at 517. Because the jury could have improperly found first degree felony murder by "bootstrapping" — finding burglary based on intent to assault and then using the finding of burglary to convict Sanders of "first degree murder without proof of malice aforethought and premeditation" — the California Supreme Court held the burglary-murder special circumstance instruction generally invalid.[5] *Id.* at 509, 517. Given that it was unclear from the evidence presented at trial whether Sanders or Cebreros actually killed Allen, and that at least one of the defendants, who may have been Sanders, said that he wanted to leave before the murder began, it is realistic to conceive that a juror could have concluded that Sanders entered Boender's apartment intending only to commit assault, not murder. If the jury had concluded that Sanders' burglary was committed with only an intent to commit assault, the jury's

[5]At trial, the jury had been instructed that "it could return a verdict of first degree murder if it found the murder was committed during a burglary in which [the] defendant entered Boender's home with the intent to (1) steal, (2) commit an assault, (3) falsely imprison the victims, or (4) dissuade the victims from testifying." *Sanders*, 51 Cal. 3d at 508.

finding of the burglary-murder special circumstance was improper. Therefore, we cannot conclude that the facts of the case made the legal problems in the aggravating circumstance instructions harmless.

We may not conclude that the jury's consideration of these aggravating circumstances did not substantially influence the jury's assessment of Sanders' suitability for the death penalty.[6] As outlined above, California's weighing process differs from that of other weighing states. Under California law, " 'weighing' . . . connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors . . . or the arbitrary assignment of 'weights' to any of them." *Brown*, 40 Cal. 3d at 542. We cannot know as an appellate court what individual weight a juror assigned to a finding of an aggravating special circumstance. Thus we may not simply assume harmless error because of the presence of other aggravating circumstances or the absence of mitigating ones.

[6]In *Allen*, another California death penalty case, we concluded that a jury's consideration of improperly "inflated" special circumstances and its erroneous double-counting of prior crimes as sentencing factors had no substantial and injurious effect on the verdict. 366 F.3d at 855-58. Even disregarding the errors in counting of special circumstances and evidence of prior crimes, the jury in *Allen* had before it "extraordinarily damaging aggravating evidence" based on a defendant "orchestrating — from jail — a conspiracy to murder seven people, and succeeding in the actual killing of three, all to retaliate for their prior testimony against him and to prevent future damaging testimony." *Id.* at 828. In our independent review of aggravating and mitigating factors in that case, we held that "[a]fter weighing the total potential mitigating evidence against the evidence in aggravation, we are compelled to conclude that every juror would have reached only one result," and noted that "[t]he especially aggravating circumstances of Allen's triple murder and conspiracy [i.e., multiple murders orchestrated from prison with no showing of remorse] are those for which the Supreme Court envisions the harshest penalty."

As explained below, the facts of Sanders' case are not comparable. Whereas in *Allen* we could easily ascertain what led the jury to impose death regardless of its consideration of improper aggravating factors, here we have no such certainty.

On the facts here, we cannot say with sufficient certainty that the jury's consideration of the two improper special circumstances did not substantially influence its sentencing determination. There is good reason to believe that the jury may have had doubts about Sanders' role in the murder and that it may thus have been only marginally inclined to impose the death penalty. There was no physical or overwhelming circumstantial evidence indicating who, as between Sanders and Cebreros, delivered the fatal blow to Allen's head.

There was also considerable uncertainty about the extent to which the murder had been pre-planned by Sanders. On the one hand, Maxwell testified that after the first attempted robbery, Sanders had expressed concern that Boender could identify him. On the other hand, Thompson told Maxwell after the murder that Allen "wasn't supposed to be dead" and "that wasn't what was planned."

[10] Similarly, the existence of other factors did not overwhelmingly compel a death sentence to the point where we can state with confidence that these circumstances, and not the invalid heinous-murder or burglary-murder special circumstances, were decisive determinants of the death sentence. Certainly, Sanders' prior violent robberies and felony conviction were aggravating. However, the last robbery he committed was 11 years before the robbery of Boender and Allen. As for the robbery-murder and witness-killing aggravating circumstances, it is not clear they would have made the heinous-murder circumstance merely superfluous, because the heinous-murder circumstance may have particularly emphasized the brutal nature of Allen's murder and thus have compelled the jurors to vote for death. The jury might have chosen to be more lenient because the means by which the victim was killed, beating rather than shooting or stabbing, do not necessarily imply an intention to cause death. The jury might also have chosen to be lenient with Sanders because Maxwell, despite her initiative in bringing about the murder, was not even charged. We cannot, of course, reconstruct the jury's

penalty determination, but there is enough uncertainty in this case to cause us to believe that consideration of the improper circumstances may well have had a substantial effect or influence on the jury's determination.

The state contends that consideration of the two invalid special circumstances was harmless because when the "title special circumstance is removed from the evidence" the substance of that evidence remains intact. Even assuming that the state is correct that on the facts of this case, the jury could still have considered the "substance of the evidence" that led it to find true the invalid special circumstances, we have grave doubt as to whether it would have imposed death absent the special-circumstance label. This was a close case, for the reasons we have already discussed, including the uncertainty as to who struck the fatal blow and which assailant wanted to leave before Allen was killed. We also note that the first jury hung on guilt. In such a situation, unlike in *Morales* and *Allen* where we could easily ascertain what led the jury to impose death, in this case the jury's improper weighing of special circumstances may well have mattered.

[11] In sum, the jury was told to weigh two special circumstances that were improperly deemed special circumstances. In a weighing state, if the trier of fact is erroneously directed to weigh certain aggravating factors due to an invalid jury instruction, and that misdirection substantially affects the jury's sentencing determination, then the defendant has not received a properly individualized sentence and the error is not harmless. In these circumstances, we are required to grant habeas relief. Here, the jury was erroneously instructed on two special circumstances that it may have applied in an invalid manner, and we have grave doubt about whether that error had substantial and injurious effect or influence in determining the jury's verdict. Accordingly, applying the standards of *Brecht*, 506 U.S. at 638, and *O'Neal*, 513 U.S. at 440, we hold the error to be not harmless.

D. Remedy

[12] When there has been a failure of adequate appellate review of an erroneous sentencing instruction in the penalty phase of a capital case, the proper remedy is to grant the writ unless there is either a new penalty trial or the death sentence is vacated and a lesser sentence imposed. *Valerio*, 306 F.3d at 763 (imposing this remedy in a capital case where the Nevada Supreme Court failed to conduct adequate appellate review). We therefore reverse the district court and remand with instructions that it shall grant the petition for the writ of habeas corpus as to the penalty phase, unless the state within a reasonable period of time either grants a new penalty trial or vacates the death sentence and imposes a lesser sentence consistent with law.

Because we are remanding for a new penalty trial, we do not consider Sanders' other challenges to his sentencing or to the process of appellate re-weighing of sentencing factors in California.

II. Guilt-Phase Challenge to Jury Venire

[13] Sanders also argues that the under-representation of Hispanics on his jury violated his Sixth Amendment right to an impartial jury drawn from a representative cross-section of the community. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the United States Supreme Court recognized that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528.

[14] To state a prima facie violation of the representative cross section requirement, a defendant must show that (1) the group alleged to have been excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;

and (3) this under-representation is due to systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). If the petitioner makes a prima facie showing under *Duren*, the burden shifts to the state to justify the under-representation "by demonstrating that attainment of a fair cross section is incompatible with a significant state interest." *Thomas v. Borg*, 159 F.3d 1147, 1150 (9th Cir. 1998); *see also Duren*, 439 U.S. at 367-68.

[15] It is undisputed that Sanders has met the first prong because "Hispanics are a 'distinctive' group for purposes of Sixth Amendment analysis." *United States v. Nelson*, 137 F.3d 1094, 1101 (9th Cir. 1998). We hold, however, that he has not met the second prong.

"The second prong . . . requires proof, typically statistical data, that the jury pool does not adequately represent the distinctive group in relation to the number of such persons in the community." *United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir. 1996). In determining whether a particular group is underrepresented in a jury venire, we use an absolute disparity analysis. *Borg*, 159 F.3d at 1150. "We determine absolute disparity by taking the percentage of the group at issue in the total population and subtracting from it the percentage of that group that is represented on the master jury wheel." *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989).

[16] Here, Sanders is "unable to provide the statistics necessary for this court to determine the absolute disparity in his case," *Borg*, 159 F.3d at 1150, because the statistics he offers fail to take any account of undocumented immigrants and other legitimately ineligible jurors within the total Hispanic population. Sanders' argument for disparity comes from testimony of Dr. Terry Newell, based on Newell's study of jury venires in Kern County, California (where Sanders' trial was held) from 1980 to 1981. At that time, Kern County compiled its master jury list from voter registration records.

Dr. Newell used the following method to determine under-representation on the jury venire. First, he relied on the 1980 census figures for the total population and total Hispanic population of Kern County.[7] The census listed a total population of 402,089 individuals in Kern County, including 87,025 Hispanic individuals, from which Newell calculated the Hispanic percentage of the total population to be 21.59 percent.[8] Recognizing that the census numbers for total population and total Hispanic population included noncitizens — persons presumptively ineligible to serve on a jury — Newell attempted to estimate the number of Hispanic *citizens* in Kern county. In that calculation, however, he used a method that is insufficient on its face. Using data from the Immigration and Naturalization Service, he obtained both the total number of legal, registered aliens in Kern County (14,387) and the number of legal, registered aliens in Kern County whose country of origin was Mexico (10,230). He then subtracted the total number of legal, registered aliens from the census count of the total population of Kern County (402,089 minus 14,387, or 387,702), and the number of legal, registered aliens from Mexico from the total number of Hispanics in Kern County (87,025 minus 10,230, or 76,795). He compared those two numbers to produce an estimate of the percentage of the citizen population that was Hispanic, which he put at 19.81 percent.[9] He then used a statistical technique that we need not describe here to account for the percentage of that population who were adults, ultimately estimating the total adult-and-citizen

[7]The 1980 census numbers included both legal, documented immigrants and an unknown number of undocumented immigrants. *See* DAVID L. WORD, NAT'L BUREAU OF THE CENSUS, THE CENSUS BUREAU APPROACH FOR ALLOCATING INTERNATIONAL MIGRATION TO STATES, COUNTIES, AND PLACES: 1981-1991 (1992) at 2.1.2, *available at* http://www.census.gov/population/www/documentation/twps0001.html.

[8]Dividing the same numbers used by Newell (87,025 by 402,089), the correct number would appear to be 21.64 percent.

[9]Thus, Newell divided (87,025 minus 10,230) by (402,089 minus 14,387) to get his estimate of the percentage (19.81 percent) of Hispanic citizens in Kern County.

Hispanic population in Kern County at 16.3 percent of the total adult-and-citizen population. He compared this estimate of the adult-and-citizen Hispanic population with the percentage of Hispanics in the jury venire (which he estimated as 8.3 percent) to find an absolute disparity of 8 percentage points between the percentage of adult Hispanic citizens in the general population and the percentage of Hispanics in the jury venire.

The flaw in Newell's methodology is his assumption that every adult Hispanic person in Kern County who was not a legal, registered immigrant from Mexico was a jury-eligible United States citizen. This assumption ignored the probability that some Hispanic noncitizens were either illegal immigrants or did not originally come from Mexico. We need not engage in sophisticated statistical analysis to conclude that Newell's assumption is highly likely to have substantially overstated the number of Hispanic jury-eligible citizens, and thus to have substantially overstated the disparity between the percentage of Hispanics in the county and the percentage of Hispanics in the jury venire.[10] Dr. Newell made no attempt to control for the effects of illegal immigration.

In *United States v. Artero*, 121 F.3d 1256, 1262 (9th Cir. 1997), we rejected a challenge based on the underrepresentation of Hispanics in the jury venire when the challenge was based only on a comparison between the number of Hispanics in the total population and those in the jury wheel, instead of between the population of Hispanics who were jury-eligible citizens and those in the jury wheel. Although Sanders, unlike the defendant in *Artero,* has made some attempt to separate

[10]This is true because it is highly likely that *Hispanic* illegal immigrants accounted for substantially more than 19.81 percent of the *total* number of illegal immigrants in Kern County at the time. Immigrants from Mexico alone made up a substantial majority (10,230/14,387, or 71.1 percent) of the legal immigrant population in Kern County, and there seems good reason to believe that the percentage of Mexicans and other Hispanics among the total number of illegal immigrants would be comparable.

out citizens from noncitizens, the methodology employed is so inadequate that it cannot answer the "right question," which is "whether Hispanics eligible to serve on . . . juries were unreasonably underrepresented because of systematic exclusion." *Id.* at 1261. Rather, it addresses a "different question, whether Hispanics, whether eligible to serve on . . . juries or not, were represented in jury wheels at a lower rate than their proportion of the population as a whole." *Id.*

[17] We take no position as to what statistical methods may be more appropriate in estimating the percentage of undocumented immigrants or other noncitizens within a total population, and recognize that it may be difficult to calculate such numbers with precision. However, where no attempt whatsoever has been made to account for the percentage of undocumented immigrants within a total population that is likely to contain such persons, we are unable to perform the necessary inquiry in a prima facie Sixth Amendment jury-venire challenge: discovering whether the systematic exclusion of a distinctive group has prevented the group from being fairly and reasonably represented in the jury venire.[11] As we noted in rejecting similarly flawed statistics in *Artero*, "A statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation." *Id.* at 1262 (internal quotation marks and alteration omitted). Therefore, we hold that Sanders has not established a prima facie Sixth Amendment violation.

CONCLUSION

We reverse the district court and remand with instructions

[11]For example, in order to determine whether a prima facie claim of an exclusionary jury venire in violation of the Sixth Amendment has been stated, we must determine whether the absolute disparity is of sufficient extent to create a constitutional violation. *See, e.g., United States v. Suttiswad*, 696 F.2d 645, 649 (9th Cir. 1982) (finding insubstantial an absolute disparity of 7.7 percent).

to grant the petition for the writ of habeas corpus as to the penalty phase, unless the state within a reasonable period of time either grants a new penalty trial or vacates the death sentence and imposes a lesser sentence consistent with law. We affirm the district court's denial of Sanders' habeas petition with regard to the guilt phase.[12]

AFFIRMED in part, REVERSED in part and REMANDED.

[12]We also deny Sanders' motion to expand the certificate of appealability and his motion for judicial notice.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD L. SANDERS,

Petitioner - Appellant,

v.

JEANNE S. WOODFORD, Warden of California State Prison at San Quentin,

Respondent - Appellee.

No. 01-99017

D.C. No. CV-92-05471-REC-P

ORDER

BEFORE: D. NELSON, KLEINFELD AND FISHER, Circuit Judges.

Judges Kleinfled and Fisher voted to deny appellee's petition for rehearing en banc, and Judge D. Nelson recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R.App.P. 35.

The petition for rehearing en banc, filed September 20, 2004, is **DENIED**.

APPENDIX C

People v. Sanders
51 Cal.3d 471; 273 Cal.Rptr. 537; 797 P.2d 561 [Sept. 1990]

[No. S004439, Crim. No. 22512. Sept. 27, 1990.]

THE PEOPLE, Plaintiff and Respondent, v.
RONALD LEE SANDERS, Defendant and Appellant

SUMMARY

A jury convicted defendant of first degree murder, attempted murder, robbery, burglary, and attempted robbery. It also found true four special circumstance allegations: the murder was committed while defendant was engaged in the commission or the attempted commission of the robbery and burglary (Pen. Code, §§ 190.2, subd. (a)(17)(i) & (vii)); the victim was intentionally killed to prevent her testimony in a criminal proceeding (Pen. Code, § 190.2, subd. (a)(10)); and the murder was especially heinous, atrocious, and cruel (Pen. Code, § 190.2, subd. (a)(14)). After the penalty phase of the trial, the jury set the penalty at death. Defendant had been involved in a scheme to attempt to rob two individuals. The robbery was botched, and defendant and an accomplice returned to the individuals' apartment, stole money and drugs, and eventually struck each individual on the head. One victim died. The other victim testified at trial, identifying both defendant and the accomplice. Another person who was involved in the botched robbery attempt, but not in the homicide, also identified defendant and the accomplice. At trial, the jury panel consisted of persons drawn from voter registration rolls. Defendant introduced evidence that Hispanics were underrepresented in the jury venire, but the trial court denied defendant's motion to quash the petit jury. After challenges for cause had been completed, there were only four people with Hispanic surnames on the panel, and the prosecution peremptorily challenged each of them with peremptory challenges. During the penalty phase

of the trial, defendant chose not to present evidence of mitigating factors. (Superior Court of Kern County, No. 22079, Gerald K. Davis, Judge.)

The Supreme Court set aside the heinous, atrocious, and cruel special circumstance and the burglary-murder special circumstance, but otherwise affirmed the judgment as to both guilt and penalty. It held that defendant had not met his burden of showing that the procedure to select potential jurors was constitutionally impermissible. It held that the prosecution's use of peremptory challenges was not improper. It held that the heinous, atrocious, and cruel special circumstance was unconstitutionally vague. It held that the jury instructions improperly permitted the jury to find a burglary based on defendant's intent to commit an assault. It also held that a witness-killing special circumstance may be found true whether or not an actual criminal proceeding was pending or about to be initiated at the time of the crime, and that the two invalid special- circumstance findings did not require reversal of the sentence. It further held that it was not incompetence for defendant's attorney to accede to defendant's wish not to present mitigating evidence at the penalty trial. (Opinion by Lucas, C. J., with Panelli, Eagleson, Kennard and Arabian, JJ., concurring. Separate dissenting opinions by Mosk, J., and Broussard, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c)Jury §30.5—Selection and Formation of Jury—Exclusion of Certain Persons and Classes—Underrepresentation of Hispanics in Jury Venire Selected From Voting Registration List.—In a homicide prosecution, the trial court did not err in denying defendant's motion to quash the petit jury on the ground that the manner in which the county assembled its master jury list violated his right to an impartial jury drawn from a fair cross-section of the

community. Although defendant presented refined statistics that Hispanics, a distinct group for purposes of analyzing whether a jury reflects a fair cross-section of the community, were underrepresented in the panel, he did not satisfy his burden of making out a prima facie case that the underrepresentation was due to a systematic exclusion of Hispanics. Evidence that a race-neutral selection process operates to permit the de facto exclusion of a higher percentage of a particular class of juror than would occur from a random draw is not sufficient. The defendant must identify an aspect of the selection process that is the probable cause of the disparity and constitutionally impermissible. When the prosecution occurred, the county assembled its master jury list by randomly drawing names from voter registration lists, and this method has not been judicially determined to be constitutionally impermissible. [Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, note, 1 A.L.R.2d 1291; see also 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2637.]

(2)Jury §30—Selection and Formation of Jury—Exclusion of Certain Persons and Classes—Defendant's Showing of Prima Facie Case of Exclusion—Prosecution's Rebuttal.—Should a defendant make out a prima facie case, using statistics, that the number of a certain racial group in a county is systematically underrepresented in jury panels, the People may rebut that showing with statistics that take into account additional persons who are jury ineligible, such as noncitizens or ex-felons.

(3)Jury §28—Selection and Formation of Jury—Drawing, Summoning, and Impaneling Jurors—Right to Representative Cross-section of Community.—In California, the right to trial by jury drawn from a representative cross-section of the community is guaranteed equally and independently by U.S. Const., 6th Amend., and Cal. Const., art. I, § 16. In order to establish a prima facie showing of violation of the fair cross-section requirement, the defendant must show: that the group alleged to be excluded is a distinctive group in

the community; that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and that this underrepresentation is due to systematic exclusion of the group in the jury selection process. If a defendant demonstrates a prima facie case of systematic underrepresentation under this tripartite test, the burden shifts to the state to come forward with either a more precise statistical showing that no constitutionally significant disparity existed, or that there was a compelling justification for the procedure that results in the disparity in the jury pool.

(4)Constitutional Law §25—Constitutionality of Legislation—Rules of Interpretation—Presumption of Constitutionality.—In considering the constitutionality of a legislative act, the court presumes its validity, resolving all doubts in favor of the act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, the court must uphold the act.

(5)Jury §30—Exclusion of Certain Persons and Classes—Violation of Statute.—In a homicide prosecution, defendant did not satisfactorily show that the method in which the county selected jurors violated former Code Civ. Proc., § 204.7 (random selection of jurors; appropriate source lists) (supplanted by Code Civ. Proc., § 197). Thus, the trial court properly denied defendant's motion to quash the jury venire. The county's jury list relied exclusively on voter registration polls and was assembled once a year. The list in use at the time of defendant's motion had been compiled the previous year. Although the county intended to complete a project in which it also selected prospective jurors from Department of Motor Vehicles records, the panel for that year had already been selected and the cost to modify the list would have been prohibitive to the county.

(6a,6b)Jury §47.5—Challenges—Group Bias—Hispanic Persons—Satisfactory Proof of Wrongful Use of Peremptory Challenges.—In a homicide prosecution, defendant did not

meet his burden of showing a strong likelihood the prosecution wrongfully used peremptory challenges to exclude Hispanics from the jury. Although the prosecution dismissed the only four Hispanic prospective jurors remaining after other jurors had been challenged and excused for cause, three of the four had expressed doubts during voir dire questioning about the ability to apply the death penalty and the fourth had admitted past arrests. Thus, there were sufficient reasons for the prosecution to dismiss the jurors other than their ethnicity. Also, the record showed that the trial judge, in ruling on defendant's objections, was aware of its duty to ensure that jurors were not excused due to a perceived group bias.

(7)Jury §47.5—Challenge—Peremptory—Group Bias.—Peremptory challenges may not be used to exclude from a jury, solely because of a presumed group bias, all or most members of an identifiable group of citizens distinguished on racial, religious, ethnic, or similar grounds. Such improper exercise of peremptory challenges violates Cal. Const., art. I, § 16, as well as the equal protection clause of the United States Constitution. If a party believes his opponent is using his peremptory challenges to strike jurors on the grounds of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. If the trial court finds the moving party has made a prima facie case, the burden shifts to the opponent to explain its peremptory challenges.

(8)Jury §48—Challenges—Peremptory—Examination as Basis—Inquiry as to View on Capital Punishment—Questioning of Hispanic Prospective

Jurors.—In a homicide prosecution, the trial court did not err in finding that defendant had not made a prima facie showing a strong likelihood that the prosecution was motivated by group bias rather than specific bias in excusing by way of peremptory challenges the only four Hispanic prospective jurors. Although the excused jurors may have been otherwise as heterogenous as the community as a whole, and this fact may under some circumstances support a finding of a prima facie case, comparisons between jurors is not often a fruitful exercise. The very dynamics of the jury selection process makes it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenges of one juror with the retention of another juror that on paper appears to be substantially similar. Such a comparison is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected.

(9)Jury §47—Use of Peremptory Challenges in Violation of Right to Equal Protection—Analysis Under State and Federal Constitutions.—The procedure for establishing a prima facie case of wrongful use of peremptory challenges in violation of a criminal defendant's federal constitutional right to equal protection of the laws is similar to that procedure addressing state constitutional concerns.

(10)Jury §43—Challenges—For Cause—Voir Dire—Inquiry as to View on Capital Punishment—Trial Court's Duty to Instruct Juror.—In a homicide prosecution, the trial court did not err in excusing for cause a venireman who stated that he did not believe in the death penalty in every instance. In such circumstances, the trial court must determine whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath. The appellate court's duty is to examine the context surrounding the juror's exclusion to determine whether the trial court's decision, that the juror's belief would substantially impair the performance of his duties, was fairly supported by the record. The venireman's expressed

antipathy to the death penalty would have undoubtedly substantially impaired the performance of his duties as a juror. Also, the trial court had no obligation to instruct the juror to set aside his personal feelings and obey the law.

(11a,11b)Criminal Law (1984) §408—Evidence—Admissibility—Opinion Evidence—Expert Witnesses—Subjects of Expert Testimony—Reliability of Eyewitness—Erroneous Exclusion of Testimony—Other Evidence Corroborating Eyewitness.—In a prosecution for murder and attempted murder, the trial court's error, if any, in excluding expert psychological testimony on the reliability of an eyewitness (the victim) who identified defendant, was harmless. Although the witness was qualified on the subject and the eyewitness's identification was a key element of the People's case, there was other corroborative evidence supporting the eyewitness identification of defendant. The eyewitness had positively recognized defendant from a botched robbery attempt that had occurred two days earlier; an accomplice's statement to police dovetailed with the eyewitness's description of the crimes and gave defendant a motive to kill the victims; the accomplice's description of defendant and another accomplice matched the eyewitness's description; and physical evidence linked defendant with the crimes.

(12)Criminal Law (1984) §657—Appellate Review—Harmless and Reversible Error—Evidence—Opinion Testimony on Reliability of Eyewitness.—When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony. However, exclusion of such evidence requires reversal only if it results in a miscarriage of

justice.

(13a,13b)Jury §42—Challenges—For Cause—Voir Dire—Inquiry as to Bias, Prejudice, and Opinion—Inquiry into Jurors' Opinions of Witnesses' Perceptions.—In a homicide prosecution, the trial court did not abuse its discretion by, during voir dire, sustaining the prosecutor's objection to defense questions that sought to elicit the opinions of potential jurors concerning the effects of stress on perception. Defendant planned to demonstrate with the challenged questions that the jurors did not have common knowledge of the effects of stress on perception and intended to lay the groundwork for the introduction of expert testimony on that subject. Since the challenged questions at voir dire were not related to aiding the exercise of peremptory challenges, but instead were intended to support defendant's position on an evidentiary question, the court did not abuse its discretion in excluding them.

(14)Jury §39—Challenges—For Cause—Purpose of Voir Dire—Aiding Counsel in Exercising Peremptory Challenges.—The purpose of questioning at voir dire is to assist the attorneys in the exercise of their peremptory challenges, not to provide foundational support for their evidentiary motions. Counsel should be allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges, whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause.

(15a,15b)Criminal Law (1984) §330—Evidence—Admissibility—Identification of Defendant—Pretrial Photographic Identification—Not Suggestive—Witness- victim's Identification of Defendant Bolstered by His Identification of Accomplice.—In a prosecution for murder of one person and the attempted murder of another, the identification of defendant by a victim-witness was not invalid notwithstanding the victim-witness's identification of an accomplice in a photographic lineup in which the accomplice's picture was the only one that matched

the victim-witness's description of the accomplice. The victim-witness had also testified that he clearly viewed his assailants and focused on his attackers' faces in order to identify them if he survived the attack; he was certain of his identification of the accomplice who matched both his and another witness's description; and only two days passed between the crime and the victim-witness's selection of the picture from the photographic array. Although the photographic array was somewhat suggestive, under the totality of the circumstances it did not demonstrate that there was a very substantial likelihood of irreparable misidentification.

(16)Criminal Law (1984) §316—Evidence—Admissibility—Identification of Defendant—Violation of Due Process.—A violation of due process occurs if a pretrial identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Whether due process has been violated depends on the totality of the circumstances surrounding the confrontation. The burden is on the defendant to show that the identification procedure resulted in such unfairness that it abridged his rights to due process.

(17)Criminal Law (1984) §321—Evidence—Admissibility—Identification of Defendant—Police Lineup Prior to Trial—Factors Showing Impermissibly Suggestive Lineup.—The factors to be considered in determining whether a lineup is impermissibly suggestive include the opportunity of the witness to view the criminal at the scene of the crime, the witness's degree of attention, the accuracy of the prior description of the criminal, the level of certainty demonstrated at the confrontation, the time between the crime and the confrontation, and the suggestiveness of the procedure employed.

(18a-18c)Homicide §85—Instructions—Felony Murder—Homicide Committed During Burglary in Which Defendant Intended to Commit Assault.—In a homicide prosecution, the trial court erred in instructing the jury that it

might convict defendant of first degree murder if it found that the killing occurred during a burglary in which defendant's intent was to commit an assault. The court may not bootstrap by instructing the jury that the intent to assault makes the entry burglary and that the burglary raises a homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation. However, the error was not prejudicial, since the jury was presented with other legally permissible alternative theories of guilt along with the legally impermissible theory, and the jury necessarily found the commission of first degree murder under at least one of the permissible theories.

(19)Homicide §16—Felony Murder—Felony Burglary Based on Intent to Assault.—A burglary based on an intent to assault cannot support a felony-murder jury instruction.

(20)Homicide §110—Appeal—Harmless and Reversible Error—Instructions—Multiple Theories of Murder—One Impermissible Theory.—Where a jury in a homicide prosecution is presented with multiple legally permissible theories of guilt and one legally impermissible theory, the applicable rule on appeal is clear: reversal is required only if the reviewing court cannot determine from the record on which theory the jury relied.

(21a,21b)Homicide §87—Instructions—Identity and Participation in Offense—Accomplice to Other Crimes Committed Prior to Homicide.—In a prosecution for murder, attempted murder, and robbery, the trial court's error, if any, in submitting to the jury the question of whether a testifying witness was an accomplice to the crimes was harmless. Although the witness admitted to being an accomplice to a bungled robbery attempt perpetrated against the same victims two days prior to the incident which resulted in the crimes at issue, the evidence was not strong that she was an accomplice to the subject crimes. Also, even if the trial court should have instructed the jury that all of the witness's testimony was subject to the corroboration requirement of Pen. Code, § 1111

(accomplice's testimony requires corroboration), there was corroboration: her descriptions of defendant and another accomplice were accurate and very similar to a surviving victim's descriptions, and physical evidence supported her testimony. Thus, it was not reasonably probable that the jury would have reached another result in the absence of any error.

(22)Criminal Law (1984) §241—Trial—Province of Court and Jury—Determination Whether Witness Accomplice.—When the evidence concerning whether a witness was an accomplice to a crime is undisputed, it is a question of law for the trial judge to decide. However, if the facts are disputed or susceptible of different inferences, the question whether the witness is an accomplice should be submitted to the jury.

(23)Criminal Law (1984) §128—Interrogation; Advice as to Constitutional Rights—Waiver of Rights—Requirement That Waiver Be Knowing and Voluntary.—A defendant may waive effectuation of the constitutional rights conveyed in an interrogating officer's warnings that the defendant may remain silent and seek an attorney, provided the waiver is made voluntarily, knowingly, and intelligently. The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that these rights have been waived.

(24)Criminal Law (1984) §129—Interrogation; Advice as to Constitutional Rights—Determination by Trial Court—Waiver of Rights Where Defendant Was Not Apprised of Charges Against Him.—In a homicide prosecution, defendant's waiver of his constitutional right to

remain silent was not invalid, notwithstanding that police did not advise him before interrogation that he was being charged with murder. A valid waiver does not require that an individual be informed of all information useful in making his decision or all information that might affect his decision to confess. The Constitution does not require that the police supply a suspect with a flow of information to help him calibrate his self- interest in deciding whether to speak or stand by his rights.

(25)Criminal Law (1984) §397—Admissibility—Demonstrative Evidence—Photograph of Victim.—In criminal prosecutions, the admission of photographs of a victim lies in the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect.

(26)Homicide §59—Admissibility—Demonstrative Evidence—Photograph of Homicide Victim.—In a homicide prosecution, the trial court's error, if any, in admitting photographs of the homicide victim, taken at the crime scene and during the autopsy, was harmless. Although the photographs may have been offered to support the prosecution's impermissible theory (as a special circumstance) that the murder was particularly "heinous, atrocious and cruel," they were also offered to indicate the manner the crime had been committed and to corroborate the testimony of the medical expert regarding the nature of the fatal blow. Also, the trial court found the photographs neither outrageous nor inflammatory. Since there was other strong evidence of guilt, it was not reasonably probable a result more favorable to defendant would have occurred in the absence of any error.[Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, note, 73 A.L.R.2d 769.]

(27)Homicide §78—Instructions—Nature and Elements of Offense—Intent—Felony-murder Special Circumstance.—The jury may sustain a felony-murder special-circumstance allegation against the actual killer without finding the killer acted with the intent to kill.

(28)Homicide §78—Instructions—Nature and Elements of Offense—Intent—Felony-murder Special Circumstance—Application to Aider and Abettor.—In order to sustain a felony-murder special-circumstance allegation against an aider and abettor, the jury must find the aider and abettor acted with the intent to kill.

(29)Homicide §78—Instructions—Nature and Elements of Offense—Intent—Felony-murder Special Circumstance—Possibility That Accomplice Other Than Defendant Committed Killing.—In a homicide prosecution in which it was not proved whether defendant or his codefendant was the actual killer of the victim, the trial court did not err in instructing the jury on the felony-murder special circumstance without requiring a finding of intent to kill. The jury was instructed on two different theories of aiding and abetting: one stated that a person aids and abets if he intentionally aids the commission of a crime; the other instruction stated that if defendant was an aider and not the actual killer, to find first degree murder the jury must find beyond a reasonable doubt that defendant aided and abetted the actual killer in the commission of a murder in the first degree. Under these instructions, the jury necessarily found that if defendant was an aider and not the actual killer, he acted with intent to kill.

(30)Homicide §101—Punishment—Death Penalty—Special Circumstance—Felony Murder—Burglary.—A burglary-felony-murder special circumstance is improper and must be set aside where the instructions permit the jury to find a burglary based on the defendant's intent to commit an assault. [See Cal.Jur.3d (Rev), Criminal Law, §§ 3341, 3343.]

(31)Homicide §101—Punishment—Death Penalty—Witness-killing Special Circumstance.—If an accused believes himself to be exposed to criminal prosecution and intentionally kills another to prevent that person from testifying in an anticipated or pending criminal proceeding, a

witness-killing special circumstance (Pen. Code, § 190.2, subd. (a)(10)), may be found true whether or not an actual criminal proceeding was pending or about to be initiated. Thus, in a homicide prosecution, a jury may sustain a witness-killing special-circumstance allegation, notwithstanding that the absence of any pending criminal proceeding at the time of the killing. [See 3 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 1576.]

(32)Homicide §101—Punishment—Death Penalty—Order of Instructions.—In a prosecution for first degree murder, the trial court did not impermissibly confuse the jury by delivering an instruction defining the crime of dissuading a witness (Pen. Code, § 136.1) immediately before instructing the jury on the witness-killing special circumstance (Pen. Code, § 190.2, subd. (a)(10)). Even though defendant was not charged with violating § 136.1, the jury was also instructed on burglary, a charged offense. In addition to robbery, assault, and false imprisonment, dissuading a witness was listed as a possible felony that defendant intended to commit when he entered the victim's apartment. Thus, the challenged instructions explained a general principle of law relevant to the issues raised by the evidence and was necessary for the jury's understanding of the case. Also, any potential confusion between the crime of dissuading a witness and the witness-killing special circumstance was dispelled by the explicit instruction on the special circumstance.

(33)Criminal Law (1984) §244—Trial—Order of Instructions.—The general rule is that the order in which jury instructions are given is immaterial. [See Cal.Jur.3d (Rev), Criminal Law, § 3052.]

(34)Homicide §101—Punishment—Death Penalty—Witness-killing Special Circumstance—Intent Requirement.—Pen. Code, § 190.2, subd. (a)(10) (witness-killing special circumstance), does not require the jury to find that but for the intent to prevent the victim from testifying, the victim would not have been killed.

(35)Homicide §101—Punishment—Death Penalty—Sufficiency of Evidence—Witness-killing Special Circumstance.—In a homicide prosecution, there was sufficient evidence from which the jury could infer that defendant intended to kill the victims due to their ability to identify him as the perpetrator of an earlier robbery attempt on the victims, where the evidence showed that shortly after the prior robbery attempt defendant expressed concern that the intended victims could identify him; defendant sought an accomplice to accompany defendant to the victims' apartment; and defendant and his accomplice bound and blindfolded the victims, moved them to separate rooms, and struck each savagely on the back of the head. Thus, the evidence supported the jury's finding true an allegation of witness-killing special circumstance (Pen. Code, § 190.2, subd. (a)(10)).

(36)Homicide §101—Punishment—Death Penalty—Constitutionality—Heinous, Atrocious, and Cruel Special Circumstance.—Pen. Code, § 190.2, subd. (a)(14) (special circumstance for murder that was heinous, atrocious, and cruel), is unconstitutionally vague.

(37)Criminal Law (1984) §520—Punishment—Penalty Trial—Excessive Special Circumstances Allegations.—The jury's determination that four special circumstance findings were true did not require reversal, notwithstanding that two of the special circumstances findings (heinous, atrocious, and cruel murder; burglary- murder), were invalid. The jury properly considered the two valid special circumstances (robbery-murder; witness-killing). The prosecutor did not urge the jury to impose the death penalty merely because of the invalid special circumstances. Instead, he described and emphasized the circumstances of the crime generally.

(38)Criminal Law (1984) §523—Punishment—Penalty Trial—Instructions—Weighing of Aggravating and Mitigating Factors—Use of Word "Shall" Directing Jury to Impose Sentence of Death.—In the penalty phase of a homicide prosecution, the trial court did not err in the use of the

word "shall" in instructing the jury that if aggravating circumstances outweighed the mitigating circumstances, the jury "shall" impose a sentence of death. Whether the unadorned "shall" instruction requires reversal depends upon the facts of each individual case. The issue is whether the instructions in conjunction with the prosecutor's arguments adequately informed the jury of its weighing and decision-making responsibility. In this prosecution, the jury was instructed with the pattern jury instruction that detailed the various aggravating and mitigating factors in the language of the statute and instructed the jury to consider, take into account, and be guided by the factors. There was nothing in the instructions, or in the prosecutor's argument, that stated the jury must merely count the various factors instead of evaluating the moral weight of each factor. The prosecutor's contention that this was a proper case to impose the death penalty did not divest the jury of its discretion or lead the jurors to believe they had no choice but to impose the death penalty.

(39a,39b)Criminal Law (1984) §521—Punishment—Penalty Trial—Defendant's Failure to Present Mitigating Evidence.—In a homicide prosecution, the fact that defendant decided to forgo presentation of mitigating evidence at the penalty phase did not require reversal of a death penalty. Although the absence of mitigating evidence may undermine the state's interest in a reliable penalty determination, defendant cannot be forced to present evidence. The reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. Also, defendant's decision not to present evidence at the penalty trial was not tantamount to a guilty plea without consent of his counsel in violation of Pen. Code, § 1018. His choice did not amount to an admission that

he believed death was the appropriate penalty, nor did he give up his right to confront or cross-examine those testifying against him at the penalty trial.

(40)Criminal Law (1984) §101—Rights of Accused—Competence of Defense Counsel—Defendant's Failure to Present Mitigating Evidence at Penalty Trial of Homicide Prosecution.—A defendant is not unconstitutionally denied adequate representation by his counsel's acceding to his wishes to decline to present available mitigating evidence at the penalty phase of a capital trial. Thus, defendant's knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase of his trial estopped him from claiming an entitlement to a reversal of the death judgment based on those decisions.

(41)Criminal Law (1984) §523—Punishment—Penalty Trial—Dual Use of Underlying Crimes.—In the penalty phase of a capital prosecution, the trial court did not err in failing to modify the standard penalty phase instruction to make clear that Pen. Code, § 190.3, factor (b) (permits the jury to consider, as an aggravating or mitigating factor, the presence or absence of criminal activity by the defendant which involved the use or attempted use of violence or the express or implied threat to use force or violence), pertained to criminal activity other than that for which defendant was convicted in the capital case. Notwithstanding the failure to modify the instruction, there was no possibility the jury was misled into "double counting" the circumstances of defendant's crimes when weighing the various factors during the penalty phase deliberations.

(42)Criminal Law (1984) §523—Punishment—Penalty Trial—Instructions—Multiple Special Circumstances.—In the penalty phase of a capital prosecution, the trial court did not err in permitting the jury to consider both the robbery-murder special circumstance and the burglary-murder special circumstance in its penalty deliberation. Even if a robbery and burglary were committed as part of an indivisible transaction,

any robbery and burglary committed by the defendant in the course of his homicidal conduct may properly be considered an independent aggravating factor. Each involves violation of a distinct interest that society seeks to protect, and a defendant who commits both offenses in the course of a murder may be deemed more culpable than a defendant who commits only one.

(43)Homicide §104—Appeal—Intercase and Intracase Proportionality Reviews.—On an appeal of a sentence of death, defendant was not entitled to either intercase or intracase proportionality review of his punishment. Neither the federal nor the state Constitution compels a comparative (intercase) sentence review. Also, even though defendant's accomplice did not receive the death penalty, the imposition of a death sentence involves a peculiarly normative and individualized determination making intracase review inappropriate.

COUNSEL

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Christopher N. Heard as Amicus Curiae on behalf of Plaintiff and Respondent.

OPINION

LUCAS, C. J.—Ronald Lee Sanders was convicted of first degree murder, attempted murder, robbery, burglary, and attempted robbery. Two allegations that he was armed with a firearm were found true. The jury also found true four special circumstance allegations: the murder was committed while defendant was engaged in the commission or the attempted commission of the robbery and burglary (Pen. Code, § 190.2, subd. (a)(17)(i) & (vii));[1/] the victim was intentionally killed to prevent her testimony in a criminal proceeding (§ 190.2, subd. (a)(10)); and the murder was especially heinous, atrocious and cruel (§ 190.2, subd. (a)(14)). After the penalty phase of the trial, the jury set the penalty at death. This appeal is automatic. (§ 1239, subd. (b).)

For the reasons stated below, we set aside the special circumstance findings based on the commission of a burglary and on the jury's conclusion that the murder was heinous, atrocious and cruel, but otherwise affirm the judgment in its entirety.

I. Facts

Guilt Phase

In 1981, Dale Boender and Janice Allen moved to Bakersfield from Oildale. Boender supported the couple by selling cocaine and marijuana. One of his customers was Brenda Maxwell, but he stopped selling to her because she owed him money from prior transactions. On the morning of January 21, 1981, Maxwell's aunt, Donna Thompson, and defendant Ronald Lee Sanders visited Maxwell. The three decided to rob Boender of drugs and money and agreed to the following plan: Maxwell would entice Boender to her home by claiming she had a friend who wanted to buy a large quantity of cocaine. When Boender

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1. All further statutory references are to the Penal Code unless otherwise indicated.

arrived, defendant would knock him out and they would rob him. Defendant would then bind Boender with duct tape before leaving. According to their plan, defendant would similarly bind Maxwell so she would appear to also have been a victim. Thompson would arrive later to "discover" and free the pair.

Maxwell's friend, Glen Blackford, was also visiting her at the time but was left in the living room while Maxwell, Thompson, and defendant planned the crime in the bedroom. When they returned to the living room after their planning session, Maxwell told Blackford "[s]omething is going to happen [so] get out of here." Blackford and Thompson then left (as planned) and Maxwell placed several calls to Boender to arrange the deal.

Enticed by the promise of a large cocaine sale, Boender and Allen drove to Maxwell's mobilehome. Allen entered the home and began to sit down next to Maxwell. As Boender stepped through the doorway, defendant emerged from the kitchen and began beating Boender with a two-foot long piece of a pool stick. A struggle ensued but Boender and Allen eventually managed to exit the mobilehome, at which point defendant fled. Boender and Allen then drove off, first to a friend's house but later to a hospital to attend to Boender's injuries. They stayed at a relative's home until Friday, January 23,1981.

Meanwhile, Thompson and defendant returned to Maxwell's mobilehome to discuss the aftermath of the botched robbery attempt. Maxwell was concerned that Boender would realize she had "set him up," and defendant was worried Boender could identify him. The three drove to a house on Jefferson Street where defendant engaged the assistance of John Cebreros. The group then went to Thompson's house where Maxwell called mutual friends of hers and Boender's to tell them she had been robbed and raped so as to enhance her claim that she had been victimized along with Boender.

On Friday, Boender and Allen decided to return to Boender's apartment. They arrived in the afternoon and told Boender's two roommates, Haney and Weinman, about the earlier assault.

Later, Boender and Allen met Boender's former roommate, George Littleton, at a bar; the three of them went to Littleton's apartment around 7 p.m. and shared a small bottle of wine. After shopping for groceries, Boender and Allen returned home. Haney and Weinman were gone for the evening.

While Boender and Allen were preparing dinner, there was a knock at the door. Leaving Allen in the kitchen, Boender went to the front door and opened it, finding Cebreros and defendant standing there, the latter armed with a gun. Although he believed he had only seconds to live, Boender concentrated on their faces so he could remember them if he should see them again. Defendant spun Boender around and pushed him to the floor, face down. He felt someone's knee in his back and something pressed against his neck. Allen emerged from the kitchen and was also made to lie on the floor. Boender's glasses were ripped from his face and both he and Allen were bound and blindfolded.

One of the assailants demanded that Boender tell them where he kept his cocaine, and he directed them to Allen's purse. After he told them his money was in his shirt pocket, someone removed it. Boender heard the two assailants rummaging through the apartment but could not tell what was going on. After a few minutes, he was dragged to what seemed like his bedroom. He heard more footsteps, muffled talking, and more banging around the apartment. One of the assailants said he wanted to leave but the other said he wanted to stay. Boender then heard someone approach, felt a blow to the head, and recalled nothing further.

Boender's roommates returned to the apartment in the early morning and discovered the apartment full of smoke. A search revealed food burning in the oven. On further investigation, they discovered Boender in his bedroom, lying in a pool of blood. After calling an ambulance, they noticed that the apartment was in disarray, there were spots of blood around, and a baggie of marijuana was missing. When Haney found Allen's body in his bedroom, he called the police.

Both Boender and Allen had been bound by lengths of electrical cord cut from Boender's vacuum cleaner. Allen sustained a fatal head wound which fractured her skull and lacerated her brain. Boender suffered a skull fracture but was conscious and semicoherent when police arrived. He was not questioned until the next day.

Haney and Weinman told police about Boender's story of the attempted robbery two days earlier, prompting police to contact Maxwell. She falsely told police that Cebreros came to her home, forced her to call Boender, and then beat him up when he arrived. However, she gave them accurate descriptions of defendant and Cebreros as well as the address of the Jefferson Street house where defendant met Cebreros. From his hospital bed, Boender gave descriptions of defendant and Cebreros that matched Maxwell's descriptions.

Cebreros was arrested the next day in front of the Jefferson Street house. In his car, police found a gun similar to that which Boender described as the one used in the attempt to murder him. In Cebreros's boot, police found a baggie of marijuana which was identical to the one taken in the robbery. Both Maxwell and Boender positively identified Cebreros as one of the assailants.

A few days later, Maxwell recanted her story and told police the truth about the bungled robbery attempt. She also told police about the duct tape defendant intended to use to bind Boender. Police found a roll of such tape in Maxwell's home and tests revealed defendant's fingerprints on it. He was arrested and positively identified by Boender in a photographic lineup later that week.

Defendant and Cebreros were tried jointly and they presented an alibi defense. Three defense witnesses testified that on the night of the murder, both defendant and Cebreros were at the home of Cebreros's brother, Salvador, talking, playing chess, and drinking beer. There was also evidence from Boender's neighbors that although two men were seen outside Boender's apartment on the night of the murder, neither one looked like Cebreros or defendant. Finally, there was evidence that

defendant had used Maxwell's roll of duct tape for an innocent purpose a few days earlier.

Defendant's first trial ended in a mistrial when the jury could not reach a verdict. On retrial, both he and Cebreros were convicted on all counts. The prosecutor declined to seek the death penalty against Cebreros and he was sentenced to life without the possibility of parole.

Penalty Phase

The prosecution produced several witnesses at the penalty phase who described five armed robberies defendant committed in Orange County in 1970. Although none of the witnesses could positively identify defendant at trial, a police expert testified that the fingerprints of the gunman in the five Orange County robberies matched defendant's fingerprints.

James Quinn testified that on October 1, 1970, he was working late at the Allstate Motel in Santa Ana when defendant and a crime partner robbed him at gunpoint. Thomas Ferguson testified that defendant, brandishing a revolver, robbed him on September 12, 1970, while Ferguson was employed as a clerk at the Station Liquor Store in Tustin. Defendant committed an armed robbery in the same establishment on November 20, 1970, this time robbing clerk Fred Turnbull.

Sammy Mitchell testified that he was working in Mitchell's Market in Tustin on October 6, 1970, when defendant robbed him at gunpoint. Defendant was finally arrested after this crime spree while fleeing from yet another armed robbery, this one occurring in a 7-Eleven convenience store, also in Tustin. Defendant confessed his guilt to all five robberies and the police officers to whom he confessed testified at the penalty phase. Defendant was sentenced to state prison and was granted parole in 1973.

Defendant declined to present any evidence in mitigation or make a closing argument. The jury returned a verdict of death within a few hours.

II. Discussion

A. *Jury Selection Issues*

1. *Systematic Underrepresentation in the Jury Pool*

(1a) Before trial, defendant moved to quash the petit jury, arguing that the manner in which Kern County assembled its master jury list violated his right to an impartial jury drawn from a fair cross-section of the community.[2] In support, he presented evidence that he claimed demonstrated a prima facie case that Hispanics were systematically underrepresented in the jury pool. The trial court denied the motion, and defendant now renews the contention.

a. *The Evidence Supporting the Motion to Quash*

At the time of defendant's trial, Kern County assembled its master jury list by randomly drawing names from the county's voter registration list. Questionnaires were then sent to those chosen to determine eligibility to serve as jurors. There was no attempt to ensure that the ethnic composition of the group selected for jury service approximated that of the county as a whole. Although there were plans in the future to use names of those holding driver's licenses to supplement those names from the voter registration lists when assembling the master jury list, such plans had not yet been implemented at the time defendant was tried.

The parties stipulated that defendant could rely, in support of his motion to quash, on the expert testimony presented in three

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2. Although defendant initially frames this issue in terms of a challenge to the assembly of the master jury list, it appears that, either by stipulaion or acquiescence, he, the People, and the trial court understood the basis of the motion to be a challenge to the composition of the jury venires in the county, because defendant's evidence went to the racial composition of those appearing for jury duty.

other recent Kern County Superior Court cases.(See *People* v. *Cantu*, Nos. 21891, 22229 (*Cantu*); *People* v. *Robinson*, No. 21518 (*Robinson*); *People* v. *Streeter*, Nos. 22346, 22056, 21910, 21368 (*Streeter*).) Dr. Newell, an expert in psychology and statistics, testified in the *Cantu* and *Robinson* cases (and his testimony was admitted in the *Streeter* case). He stated that he had scrutinized the available data from the 1980 census and had analyzed jury panels in Kern County between October 1980 and February 1981, as well as panels in May 1981. In *Cantu*, he testified that the government census reported that Kern County was 21.59 percent Hispanic, and estimated that 17.76 percent of the county was both Hispanic and at least 18 years old, i.e., presumptively jury eligible.[3] To determine the ethnic makeup of the group summoned for jury duty during the period in question, Dr. Newell scrutinized the master jury list, presumably noting those with Spanish surnames. He also conducted telephone surveys to confirm the number of those on the list who were Hispanic. He concluded that 8.3 percent of those appearing for jury duty were Hispanic.

In the *Robinson* case a few months later, Dr. Newell presented even more refined statistics. From the Immigration and Naturalization Service, he obtained the information that 14,387 Hispanic resident aliens resided in Kern County in 1978. (Such evidence was not available for 1980.) Deducting that number from the total number of Hispanics in the county (based on 1980 census figures), Dr. Newell opined that 19.81 percent of Kern County residents were Hispanic. (2)(See fn. 4.)[4] Using

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3. To arrive at the 17.76 percent figure, Dr. Newell derived a ratio using the available data from the 1970 census. In that year, 16.9 percent of the county was Hispanic and 13.9 percent was both Hispanic and at least 18 years old. Dr. Newell testified that, if anything, this method underestimated the number of jury-eligible Hispanics in the county because of a trend during the 1970's toward smaller families.

4. By using such refined statistics, defendant's case does not present the question whether use of total population figures is permissible. Previously, a three-justice plurality of this court concluded a defendant could

the same methodology as in the *Cantu* case (see fn. 3, *ante*), he estimated that 16.3 percent of the county was made up of adult Hispanics.4 He reiterated that 8.3 percent of those appearing for jury duty were Hispanic. He concluded that the likelihood the exhibited disparity would occur by chance was one in one million.

After reading the transcripts of the *Cantu*, *Robinson*, and *Streeter* cases and hearing argument on the issue, the trial court denied without prejudice defendant's motion to quash, stating, "I do believe that there has been a prima facie showing that there is a disproportionate number of people with Hispanic surnames called for jurors, but I am not sure that that means a thing, and everybody knows by reading the Los Angeles Times and any other publication that there are an enormous number of

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use total countywide population numbers in making his prima facie case of a constitutional violation. (*People* v. *Harris* (1974) 36 Cal.3d 36, 54-55 [201 Cal.Rptr. 782, 697 P.2d 433].) However, we later held "*Harris* should not be applied retroactively to cases in which juries were selected before the *Harris* decision was rendered." (*People* v. *Myers* (1987) 43 Cal.3d 250, 269 [233 Cal.Rptr. 264, 729 P.2d 698].) And recently, this court held that henceforth, "a defendant who has access to census or other demographic data that reflect adult population figures must base his challenge on that date." (*People* v. *Bell* (1989) 49 Cal.3d 502, 526, fn. 12 [262 Cal.Rptr. 1, 778 P.2d 129]; see also *id.* at p. 556 [conc. opn. by Kaufman, J.].)

Because defendant provided refined statistical data and did not rely on *Harris's* holding permitting reliance on total population figures, we need not resolve the question of whether this court violated equal protection principles by holding, in *Myers, supra,* 43 Cal.3d 250, that the *Harris* holding should not be applied retroactively. (See *Myers* v. *Ylst* (9th Cir. 1990) 897 F.2d 417.)

Defendant and the People engage in extended argument concerning whether the record indicates Dr. Newell had calculated the number of noncitizens in the county before arriving at the 16.3 percent figure. We need not decide this point since he clearly presented statistics based on the number of Hispanics in the county over the age of 18 and this refinement is sufficient. (*Bell, supra,* 49 Cal.3d at p. 526, fn. 12.) Should a defendant make out a prima facie case, however, the People may rebut that showing with statistics which take into account additional persons "who are jury ineligible--*noncitizens*, ex-felons, etc." (*Ibid.*, italics added.)

people in this country illegally or green card-wise [sic] who are not even citizens. [¶] So, I don't think that really in and of itself means anything." Defendant renewed the motion later and it was again denied.

b. *The Fair Cross-section Principle*

(3) "In California, the right to trial by jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution (*Taylor* v. *Louisiana* (1975) 419 U.S. 522, 530 [42 L.Ed.2d 690, 698, 955 S.Ct. 692]) and by article I, section 16 of the California Constitution. (*People* v. *Wheeler* (1978) 22 Cal.3d 258, 272 [148 Cal.Rptr. 890, 583 P.2d 748].)" (*Williams* v. *Superior Court* (1989) 49 Cal.3d 736, 740 [263 Cal.Rptr. 503, 781 P.2d 537].) "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." (*Duren* v. *Missouri* (1979) 439 U.S. 357, 364 [58 L.Ed.2d 579, 99 S.Ct. 664]; see also *Bell, supra*, 49 Cal.3d at p. 525; *People* v. *Morales* (1989) 48 Cal.3d 527, 543 [257 Cal.Rptr. 64, 770 P.2d 244].) If a defendant demonstrates a prima facie case of systematic underrepresentation under this tripartite test, the burden shifts "to the state to come forward with either a more precise statistical showing that no constitutionally significant disparity existed or that there was a compelling justification for the procedure which results in the disparity in the jury pool." (*Harris, supra*, 36 Cal.3d at p. 50.)

c. *Application*

(1b) The first prong of the *Duren* test is clearly satisfied; Hispanics, or those with Spanish surnames, constitute a distinctive group for purposes of a fair cross-section analysis. (*Morales, supra*, 48 Cal.3d at p. 543.)

The second prong may be satisfied by showing "that the number of members of the cognizable group is not fair and reasonable in relation to the number of members in the relevant community." (*Bell, supra*, 49 Cal.3d at p. 526.) Working from defendant's most refined statistics, adult Hispanic citizens made up 16.3 percent of Kern County, whereas only 8.3 percent of those appearing for jury duty were Hispanic. Thus, there was an 8 percent absolute disparity and a 49 percent comparative disparity.[5/]

We have previously noted that "the [United States] Supreme Court has not yet spoken definitively on either the means by which disparity may be measured or the constitutional limit of permissible disparity." (*Bell, supra*, 49 Cal.3d at pp. 527-528,

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5. "The 'absolute disparity' test measures representativeness by the difference between the proportion of the population in the underrepresented category, and the proportion of those persons in the source or pool in the underrepresented category." (*Bell, supra,* at p. 527, fn. 14; see also Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) 65 Cal.L.Rev. 776, 789-790.) It is "obtained by subtracting the jury representation percentage from the community percentage." (*Morales, supra,* 48 Cal.3d at p. 544.)

The comparative disparity standard is obtained by the following formula:

$$\frac{A - B}{A} \times 100 = \text{the comparative disparity,}$$

where: A = the percentage of the community that makes up the cognizable group in question, here adult Hispanic citizens, and

B = the percentage of the jury venire which is composed of the cognizable group in question.

(See Kairys, *supra,* 65 Cal.L.Rev. at pp. 790-791.)

fns. omitted.)[6/] As in Bell, however, we need not resolve this difficult line-drawing question because defendant fails to establish a prima facie case under *Duren*'s third prong by showing the disparity is caused by "systematic" exclusion of Hispanics from Kern County juries.

By basing his motion to quash on the expert statistical evidence given in the *Cantu*, *Robinson*, and *Streeter* cases, defendant sought to show a statistical disparity occurred over time and was thus the result of a "systematic exclusion" of Hispanics. As we recently explained in *Bell, supra*, however, such a showing is insufficient, standing alone, to make out a prima facie case of a Sixth Amendment violation. When, as here, "a county's jury selection criteria are neutral with respect to race, ethnicity, sex, and religion, more is required to shift the burden to the People. The defendant must identify some aspect of the manner in which those criteria are being applied that is: (1) the probable cause of the disparity, and (2) constitutionally impermissible." (*Bell, supra*, 49 Cal.3d at p. 524.) Evidence that "race/class *neutral* jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw" is insufficient to make out a prima facie case. (*Morales, supra*, 48 Cal.3d at p. 546, italics in original.)

Defendant claims he has satisfied this requirement in *Bell* (*supra*, 49 Cal.3d 502) by relying not only on the statistical disparity, but on the fact that at the time of defendant's trial, Kern County assembled its master jury list solely from the voter registration list. Not only does he argue this is the "probable source" of the disparity, he contends the practice is "constitutionally impermissible," citing *People* v. *Harris,*

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6. Some courts and commentators have expressed the opinion that the comparative disparity approach is superior to the absolute disparity standard. (*Bell, supra,* at pp. 565-566, and cases cited [dis. opn. by Broussard, J.]; Kairys, *supra*, 65 Cal.L.Rev. at pp. 793-799.) This court, however, has declined to adopt one approach to the exclusion of the other. (*Bell, supra,* at p. 527, fn. 14.)

supra, 36 Cal.3d 36. Our concern here is with the latter requirement: because the county's juror selection procedures were facially neutral, has defendant shown that procedure is nevertheless "constitutionally impermissible" within the meaning of *Bell*?

There is some language in the lead opinion in *Harris* suggesting that sole reliance on voter registration lists in assembling the master jury list is constitutionally prohibited. We do not, however, read *Harris* so broadly. In that divided opinion, a three-justice plurality held the defendant made a prima facie showing of a fair cross-section violation based on a statistical showing of racial disparity and the fact that the county assembled its master jury list using only voter registration lists. (36 Cal.3d at p. 58 [plur. opn. by Broussard, J., joined by Bird, C. J., & Reynoso, J.].)Although the trial court did not find the defendant made a prima facie case — and thus the People were never asked to present any rebuttal evidence — the plurality reversed the judgment. Three other justices dissented on this point. (*Id.* at pp. 72 [dis. opn. by Mosk, J., joined by Richardson, J.], 75 [dis. opn. by Kaus, J.].)

In a pivotal separate opinion, Justice Grodin provided a reluctant fourth vote to reverse. He expressly agreed with the plurality that defendant made a prima facie case, despite relying on total population statistics. Justice Grodin further stated that "in light of published studies which point to the exclusive reliance upon voter registration lists as a likely source of racial and ethnic disparity in the composition of juries, I am prepared to say that defendant's showing should be regarded as sufficient to trigger further inquiry." (*Harris, supra*, 36 Cal.3d at p. 71 [conc. opn. by Grodin, J.].)

Significantly, he further explained that he "*would not reverse the judgment on that account*." (*Harris, supra*, 36 Cal.3d at p. 71, italics added.) Because the People had no occasion to present rebuttal evidence, he opined the case should be remanded to allow them to do so. (*Id.* at pp. 71-72.) "Upon full consideration of the relevant evidence it might be concluded

that 'no disparity of constitutional significance exists,' or that 'even with the use of multiple sources and all other practical means, a certain level of disparity is unavoidable,' or that the underrepresentation which does exist is justified by a showing of overriding state interest." (*Id.* at p. 72, quoting plur. opn. at p. 59.) Justice Grodin then explained that although he preferred the remand option, there would be no disposition of the case were he to insist on that alternative. Finding this an "intolerable" result, and concluding that he "fundamentally" disagreed with the dissenting opinions, he reluctantly joined the plurality opinion's disposition to reverse. (*Ibid.*)

As is clear, Justice Grodin did not join the Harris plurality's far-reaching conclusion that sole reliance on voter registration lists was itself constitutionally prohibited.[7] Indeed, he twice stated his position that identification of that fact, coupled with an adequate statistical showing of racial disparity, merely established a prima facie case of a constitutional violation, and should not itself require reversal.

Since *Harris, supra*, 36 Cal.3d 36, however, this court has refined the procedure by which a criminal defendant can establish a prima facie case of a fair cross-section violation.

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7. The *Harris* plurality opinion is far from clear on this point as well. That opinion first noted our decision in *People v. Sirhan* (1972) 7 CAL.3d 710 [102 Cal.Rptr. 385, 497 P.2d 1121], in which we held that "[t]he use of voter registration lists as the sole source of jurors is not constitutionally invalid [citations], at least in the absence of a showing that the use of those lists resulted 'in the systematic exclusion of a "cognizable group or class of qualified citizens."'" (*Id.* at pp. 749-750.) Although the *Harris* plurality then suggested that the defendant was trying to make just such a showing, it did not overrule *Sirhan* on this point. It is thus arguable that *Harris* did not "hold" sole reliance on voter registration lists was itself impermissible, even with Justice Grodin's vote.

It appears, however, that the plurality's opinion has been interpreted as holding that sole reliance on voter registration lists is impermissible. (*Harris, supra*, 36 CAL.3d at pp. 72-73 [Mosk, J., dis.]; see also *United States* v. *Underwood* (N.D.Ala. 1985) 617 F.Supp. 713, 716; *Waller* v. *Butkovich* (M.D.N.C. 1984) 593 F.Supp. 942, 958.)

Unlike in *Harris*, a defendant attacking facially neutral procedures as the "probable cause" of the statistical disparity must now demonstrate that such procedures are either "constitutionally impermissible" or are being implemented in a constitutionally objectionable manner. (*Bell, supra*, 49 Cal.3d at p. 524.) As explained above, *Harris* does not constitute controlling authority for this latter point. Resort to other authority is similarly unhelpful to defendant's position.

We begin our analysis by noting that, at the time of defendant's trial, our state Legislature permitted sole reliance on voter registration lists to assemble the master jury list. As explained below, former Code of Civil Procedure section 204.7 stated that source lists for jurors "shall include those who are registered voters." The section also provided that the list should be supplemented from lists from the Department of Motor Vehicles (DMV) in those counties where such supplementation was practical and would not entail "significant cost." The negative implication of this statutory language was that sole reliance on voter registration lists was permissible where supplementation was impractical or costly.

(4) We presume this statute was constitutional. "'In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act. [Citations.]'" (*County of Sonoma* v. *State Energy Resources Conservation etc. Com.* (1985) 40 Cal.3d 361, 368 [220 Cal.Rptr. 114, 708 P.2d 693], quoting *California Housing Finance Agency* v. *Elliot* (1976) 17 Cal.3d 575, 594 [131 Cal.Rptr. 361, 551 P.2d 1193].)

(1c) Our past decisions, and those of other courts, are in accord. As discussed, *ante*, at page 494 footnote 7, we held in 1972 that sole reliance on voter registration lists was not itself constitutionally invalid. (*Sirhan, supra*, 7 Cal.3d at pp. 749-750.) Moreover, the federal circuits are unanimous on this

point. Interpreting the Jury Selection and Service Act of 1968 (28 U.S.C. §§ 1861-1867), circuit courts of appeal have routinely held sole reliance on voter registration lists does not violate the fair cross-section rule absent some evidence of active discrimination.

United States v. *Cecil* (4th Cir. 1988) 836 F.2d 1431 (cert. den. (1988) 487 U.S. 1205 [101 L.Ed.2d 883, 108 S.Ct. 2846]), is illustrative. In that case, the United States Court of Appeals for the Fourth Circuit opined that sole use of voter registration lists "cannot be described 'as "systematically" excluding classes that do not register in proportion to their numbers'; it is a process that comports with the 'need for efficient jury selection' even though it may not 'perfectly reflect population.' Nor does it follow that the voter registration lists do not satisfy the fair cross-section ... [requirement] simply because ... members of one group neglected to register in the same proportion as was their share in the overall population. the Constitution and the [federal] statute do not require such perfection. It is sufficient that the system adopted provides a fair cross-section and we find both common sense and precedent establish that if the voter registration lists do this they are not tainted by some affirmative form of discrimination." (*Id.* at pp. 1448-1449; see generally *id.* at pp. 1444-1451, and cases cited; Annot., Construction and Application of Provisions of Jury Selection and Service Act of 1968 (28 USCS §§ 1861-1867) Governing Plans for, and Manner of, Selecting Federal Grand and Petit Jurors (1973) 17 A.L.R.Fed. 590, 608, § 7[a] and cases cited.)

Significantly, the rule laid down in *Sirhan, supra*, 7 Cal.3d at pages 749-750, as well as the complementary rule of law in numerous federal cases, existed before and during defendant's trial. Former Code of Civil Procedure section 204.7 was also in force at that time. In light of these persuasive authorities, we conclude defendant fails to demonstrate the county's race neutral procedures for using voter registration lists to assemble the county's master jury list was constitutionally impermissible and, accordingly, we conclude the trial court correctly denied the

motion to quash.[8]

2. *Former Code of Civil Procedure Section 204.7*

(5) In conjunction with his pretrial challenge to the composition of the jury venire, defendant also claimed the master jury list was assembled in violation of former Code of Civil Procedure section 204.7, at the time a relatively new statute. (Stats. 1980, ch. 81, § 35, p. 207, eff. July 1, 1981.)[9] The evidence produced in support of the motion showed that at the time of his 1981 trial, Kern County relied solely on voter registration rolls to compile its jury lists. Although an attempt was made to incorporate and integrate the names of those holding driver's licenses and identification cards from the DMV, the county intended to complete this project only in time to select the 1982 master jury list. The jury list was assembled once a year and the list in use at the time of defendant's motion (November 1981) had been compiled the previous year. For Kern County to expand and use multiple source lists any sooner would have cost between $15,000 and $40,000 for a computer program to eliminate duplicate names (in order to maintain the randomness of the selection procedure).

At the time of defendant's trial, former Code of Civil Procedure section 204.7 provided that "(a) Source lists of jurors

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8. The trial court apparently denied defendant's motion to quash because his supporting evidence failed to take account of the number of illegal aliens of Hispanic descent living in Kern County. As discussed *ante*, at page 490, footnote 4, a defendant need not present such refined statistics to establish a prima facie case. Albeit for the wrong reason, the trial court reached the correct result.

9. Former Code of Civil Procedure section 204.7 has since been repealed. (Stats. 1988, ch. 1245, § 1.) It has been supplanted by section 197 of the same code, which states that a master jury list assembled from lists of registered voters and driver's license holders, "when substantially purged of duplicate names, shall be considered inclusive of a representative cross section of the population."

shall identify persons who reside in the county, and who are 18 years of age or older, shall include those who are registered voters, and to the extent that systems for producing jury lists can be *practically modified, without significant cost*, shall also include those who have been licensed or issued an identification card pursuant to Article 3 ... and Article 5 ... of Chapter 1 of Division 6 of the Vehicle Code. Qualified jury lists and master jury lists derived from the source lists shall be prepared so as to reasonably minimize duplication of names." (Italics added.)

The trial court denied defendant's motion at a November 1981 hearing, concluding that the section did not become effective until January 1982, "if then." In addition, the court specifically declined to make a finding on the financial feasibility of the immediate use of multiple source lists. Although the trial court did not explain its decision regarding the effective date of the newly enacted statute, it appears the court believed that because Kern County assembled its master jury list only once each year and the list for 1981 had already been chosen, the new statute would affect only. the master jury list for 1982, which would supplant the previous year's jury list in January 1982.

The trial court did not cite any authority for its interpretation of the former code section, making it difficult to evaluate the correctness of its ruling. However, even assuming arguendo the trial court erred, defendant cannot prevail. As the evidence below made clear, Kern County was, at the time defendant made his motion, in the process of complying with the statutory requirement to integrate DMV lists into the master jury list. Recognizing that mandating overnight changes was unwise, the Legislature only required that "systems for producing jury lists" be modified to include DMV lists if such changes could be done "without significant cost." Because the record shows the cost of immediate compliance would have been several thousand dollars, and that compliance would occur shortly, we conclude the motion was properly denied because the record shows the master jury list could not be "practically modified, without

significant cost ...." (Former Code Civ. Proc., § 204.7.)

3. *Wheeler Error*

(6a) During voir dire, all but four Spanish surnamed persons were excused for cause by either the prosecution or the defense. When the remaining four were peremptorily challenged by the prosecutor, defendant objected, claiming the prosecutor was exercising his peremptory challenges to improperly exclude Spanish surnamed persons from the jury. (*People* v. *Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748].) The trial court denied the motion, finding defendant failed to demonstrate a prima facie showing that the prosecutor was relying on group rather than specific bias. We agree the court properly denied the motion.

(7) It is now well established that "peremptory challenges may not be used to exclude from a jury, solely because of a presumed 'group bias,' all or most members of an identifiable group of citizens distinguished on racial, religious, ethnic, or similar grounds." (*People* v. *Snow* (1987) 44 Cal.3d 216, 222 [242 Cal.Rptr. 477, 746 P.2d 452].) Such improper exercise of peremptory challenges violates article I, section 16, of the California Constitution (*People* v. *Turner* (1986) 42 Cal.3d 711, 716 [230 Cal.Rptr. 656, 726 P.2d 102]; *Wheeler, supra*, 22 Cal.3d at pp. 276-277), as well as the equal protection clause of the United States Constitution. (*Batson* v. *Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712].)

"If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood

that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler, supra*, 22 Cal.3d at p. 280; see also *Snow, supra*, 44 Cal.3d at p. 222.) If the trial court finds the moving party has made a prima facie case, the burden shifts to the opponent to explain its peremptory challenges. (*People* v. *Johnson* (1989) 47 Cal.3d 1194, 1216 [255 Cal.Rptr. 569, 767 P.2d 1047].)

(6b) Defendant clearly raised the issue in timely fashion and made as complete a record as possible. Moreover, contrary to the People's argument, defendant's reliance on Spanish surnamed persons as a category of excluded jurors is permissible. (See *Morales, supra*, 48 Cal.3d at p. 543.) We conclude, however, that the trial court properly found defendant failed to demonstrate "from all the circumstances of the case" a "strong likelihood" that the prosecutor's use of peremptory challenges to excuse the four Spanish surnamed jurors was based on group, rather than specific, bias. Because defendant thus failed to make a prima facie showing of a constitutional violation, the prosecutor's burden of justification never arose.

An examination of the voir dire proceedings supports this conclusion. Mrs. Sosa was the first Spanish surnamed person peremptorily challenged by the prosecutor. She stated she was a cook for the Child Development Center and that her husband was director of maintenance and transportation at a local school. She had three adult children and had lived in Kern County for eleven years. When asked about the death penalty, she replied, "That is kind of scary" and that she was "absolutely" opposed to the death penalty on religious grounds. On later questioning, she was asked whether she would impose the death penalty in a proper case under proper instructions; she said, "Yes, I guess."

Mr. Arrambide was questioned shortly after Mrs. Sosa. He was a labor contractor, married, and had five children. He had lived in Kern County since 1948 and did not read a newspaper. He seemed distracted because he had lost a job that day due to his jury duty and was concerned that he would lose more jobs. He operated five work crews and explained that "if I am not

there, well, they say that guy is not interested in the job .... Some farmers understand, but some don't." Later, when asked whether he would lose many jobs by serving on defendant's jury, he admitted he did not know. When asked about the death penalty, Mr. Arrambide stated his belief that only God could take a man's life, but that he could vote to impose the death penalty. Later, he said he could not, and appeared confused by the questioning. There was some suggestion of a language problem.

Defendant first raised the Wheeler issue after Sosa and Arrambide were excused. The trial court denied the motion, stating, "I certainly don't think there is at this particular point an indication that there is an intention to rid this jury of all Spanish surnamed individuals. [¶] I tell you now that I do not know the reason for the excusing of [Mrs.] Sosa but it's very obvious why Mr. Arrambide was excused. Motion is denied at this point. But I want to find that there is no obvious reason for the excusing of Mrs. Sosa."

A few days later, Mr. Lara was questioned. A mechanic, Lara was married, had no children, and had lived in the county for 19 years. He initially stated he would always choose life over death and was absolutely opposed to the death penalty. The prosecutor interposed a challenge for cause which was ultimately denied after Lara was questioned by defense counsel. Lara admitted he could conceive of a crime for which death might be appropriate and, after some pointed questioning, he eventually conceded he could vote for the death penalty if he were retained on the jury.

After Mr. Lara was questioned, counsel for both defendant and Cebreros announced they were satisfied with the panel. The prosecutor then exercised one of his remaining peremptory challenges to excuse Juror Lara. Defendant renewed his Wheeler motion but the trial court again denied it, stating, "I am keeping [track] of it and I made a finding that I couldn't see any reason with Mrs. Sosa. But with Mr. Lara, it's very obvious when I first asked him about the death penalty he indicated he

was opposed to it. I don't think [the prosecutor's challenge] was done for any racist reason whatsoever and the court will make such a finding." Counsel argued briefly but to no avail that although Mr. Lara initially expressed personal opposition to the death penalty, his later responses on voir dire showed he had modified his position in that regard.

Mr. Mercado was the final Spanish surnamed person on the panel. At the beginning of the voir dire, the trial judge admitted that he knew Mr. Mercado due to a prior association between the judge's wife and Mercado's mother. Mr. Mercado affirmed that the connection would not affect his ability to be impartial.

Mr. Mercado was a high school math teacher, having graduated from Fresno State. His wife was a junior high school teacher and they had one child, then two years old. He stated he read the local paper regularly but not thoroughly, and had no recollection of defendant's case, although he knew the brother of one of the witnesses (Glen Blackford). He stated he was in favor of the death penalty but could keep an open mind. Although his cousin worked for the California Highway Patrol and he had a few friends who were deputy sheriffs, he claimed that he would not accord a law enforcement officer's testimony undue weight. He admitted that while sitting as an alternate, he might be thinking about his high school baseball team because they were due to begin preconditioning, but he would probably be able to set those thoughts aside.

Mr. Mercado then admitted he had suffered two arrests in his life. In the first, he was arrested for"grand theft auto" when he was 18 years old. The matter was reduced to misdemeanor joyriding and he received probation. In the second, he recounted that while in college, he and a Black friend were confronted by eight college football players. The players made some racially derogatory remarks and a fight ensued. When the police arrived, the eight players had fled but police arrested Mercado's friend for being drunk in public. When Mercado attempted to intervene by offering to drive his friend home, he was arrested for obstructing an officer in the performance of his

duties. The charges were later dropped.

After the prosecutor used a peremptory challenge to remove Mr. Mercado, the fourth and final Spanish surnamed juror, defendant renewed his Wheeler motion a second time. The trial judge stated "Gentlemen, this young man, and I have known [Mercado] a long time. I was shocked to hear about his run ins with the police. I was unaware of it. I think the district attorney has ample grounds under those circumstances."

Defendant first contends that the fact that the prosecutor struck all four of the remaining Spanish surnamed potential jurors from the panel demonstrates a strong likelihood of an impermissible motivation. Although the removal of all members of a certain group may give rise to an inference of impropriety (*Wheeler, supra*, 22 Cal.3d at p. 280), we cannot say this factor was dispositive on this record. It is clear the trial court was "aware of [its] duty under *Wheeler* to be sensitive to the manner in which peremptory challenges were used." (*Johnson, supra*, 47 Cal.3d at p. 1221.) After carefully scrutinizing the voir dire proceedings, the trial court — clearly aware the prosecutor had removed the remaining Spanish surnamed venire persons — held defendant failed to demonstrate a strong likelihood based on "all the circumstances of the case" that the prosecutor's exercise of his peremptory challenges were based on group bias.

We reiterate that ruling on Wheeler motions "'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors.' [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim ...." (*Wheeler, supra,* 22 Cal.3d at p. 281, quoting Kuhn, Jury Discrimination: The Next Phase (1968) 41 So. Cal.L.Rev. 235, 295, fn. 5; see also *Johnson, supra*, 47

Cal.3d at pp. 1219-1222.) Applying this standard of giving considerable deference to the determination of the trial court, "we see no good reason to second-guess [the trial court's] factual determination" (*Johnson, supra*, at p. 1221) that the prosecutor was not motivated by bias against Hispanics.

(8) Defendant also contends the trial court should have found he made a prima facie showing because aside from their ethnicity, the four excused jurors were otherwise "as heterogeneous as the community as a whole." (*Wheeler, supra*, 22 Cal.3d at p. 280.) While this fact may, under some circumstances, support a finding of a prima facie case, comparisons between jurors is not often a fruitful exercise. "[T]he very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*Johnson, supra*, 47 Cal.3d at p. 1221.) Such a comparison "is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected." (*Ibid.*)

Although defendant argues the prosecutor's voir dire of the jurors in question was "superficial if not exactly desultory" (see *Wheeler, supra*, 22 Cal.3d at p.281), the record does not support this assertion; our independent examination of the record does not reveal the voir dire of the four potential jurors was either limited or desultory, or was in any way different from the other jurors on the panel.

Defendant thus fails to convince us that our traditional deference to a trial court's ruling on a Wheeler motion is inappropriate. **(9)**(See fn.10.) We conclude the trial court properly found defendant failed to make a prima facie showing of a strong likelihood that the prosecutor's challenges were motivated by group, rather than specific, bias.[10/]

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10. In supplemental briefing, defendant claims the prosecutor's use of peremptory challenges violated defendant's right to equal protection of

4. *Witherspoon/Witt Error*

During routine questioning on voir dire, venireman Giangregorio volunteered that he did not believe in capital punishment. Later, when questioned about that topic by the trial judge, the following colloquy occurred:

"Q: How do you feel about the death penalty?

"A: I am against it, your Honor.

"Q: Are you against it in every case?

"A: Every instance. I do not believe in it." The prosecutor's motion to exclude for cause was thereafter granted over a defense objection.

(10) Defendant now contends Giangregorio's excusal violated the precepts laid down in *Witherspoon* v. *Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] (*Witherspoon*). As he recognizes, however, the high court limited *Witherspoon*, establishing a less stringent standard, in part because of the modern trend against permitting a capital jury to act with unfettered discretion. (*Wainwright* v. *Witt* (1985) 469 U.S. 412, 422 [83 L.Ed.2d 841, 850, 105 S.Ct. 844] (*Witt*).) *Witt* requires that the trial court determine "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at p. 424 [83 L.Ed.2d at pp. 851-852].) "Under *Witt*, therefore, our duty is to 'examine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would

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the laws. (See *Batson* v. *Kentucky, supra,* 476 U.S. 79.) Although the rule in *Batson* vindicates a federal constitutional right, whereas *Wheeler* addressees a state constitutional concern, the procedure for establishing a prima facie case under both cases is similar. (See *Johnson, supra*, 47 Cal.3d at p. 1216 [jointly analyzing the issue under both cases].) For the reasons discussed above, we conclude defendant fails to show the "facts and other relevant circumstances raise an inference that the prosecutor used [his peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson, supra*, at p. 96 [90. L.Ed.2d at pp. 87-89].)

"substantially impair the performance of his duties ..." was fairly supported by the record.'" (*People* v. *Miranda* (1987) 44 Cal.3d 57, 94 [241 Cal.Rptr. 594, 744 P.2d 1127], quoting *Darden* v. *Wainwright* (1986) 477 U.S. 168, 176 [91 L.Ed.2d at p. 154].)

Defendant first contends we should retain the stricter *Witherspoon* standard as a matter of state constitutional law. (See Cal. Const., art. I, § 16 [right to trial by jury].) However, we have already adopted the *Witt* standard, because it "'make[s] good sense, and because California courts have generally followed the teachings of the high court in determining when a prospective juror properly may be excused for cause because of his views regarding capital punishment ....'" (*People* v. *Guzman* (1988) 45 Cal.3d 915, 955 [248 Cal.Rptr. 467, 755 P.2d 917], quoting *People* v. *Ghent* (1987) 43 Cal.3d 739, 767 [239 Cal.Rptr. 82, 739 P.2d 1250].)[11]

He next argues that Giangregorio's excusal was improper even under the *Witt* standard. Giangregorio's expressed antipathy to the death penalty in "every instance," however, would undoubtedly"substantially impair the performance of his duties as a juror ...." (*Witt, supra*, 469 U.S. at p. 424 [83 L.Ed.2d at p. 851].) Although defendant submits the trial court

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11. Defendant contends that adoption of the *Witt* standard over the *Witherspoon* standard does not comport with this state's expressed preference for "strict standards in death penalty cases." (See, e.g., *People* v. *Bigelow* (1984) 37 Cal.3d 731, 743, fn. 7 [209 Cal.Rptr. 328, 691 P.2d 994, 64 A.L.R. 4th 723].) We agree with the high court, however, that "there is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries. *Witherspoon* is not grounded in the Eight Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." (*Witt, supra,* 469 U.S. at p. 423 [83 L.Ed.2d at p. 851] quoted with approval in *People* v. *Howard* (1988) 44 Cal.3d 375, 417 [243 Cal.Rptr. 842, 749 P.2d 279[.)

should have explained to Giangregorio that it was his civic duty to set aside his personal feelings and obey the law, we have previously rejected that notion, finding nothing in Witherspoon that obligates a trial court to so instruct a juror. (*Miranda, supra*, 44 Cal.3d at p. 96.)

We conclude prospective juror Giangregorio was properly excused from the jury.[12/]

B. *Guilt Phase Issues*

1. *Exclusion of Expert Testimony Regarding Eyewitness Identification*

(11a) At trial, defendant offered the testimony of Dr. Elizabeth Loftus, an expert on eyewitness identifications. Dr. Loftus would have testified to the following:[13/] To provide a basis for her expert opinion, she read the police reports in the case as well as the transcript of the preliminary examination. In addition, she viewed the photographic lineup and discussed the case with defense counsel. Based on this information, she determined the following factors could have influenced the eyewitness identification in this case: (1) stress or fear; (2) violence; (3) weapon focus; (4) retrograde amnesia; (5) ingestion of drugs or alcohol; and (6) a photo-biased identification. She did not intend to give an opinion as to

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12. Although defendant originally challenged the excusal of two other venire persons (Shepard and Boston) in addition to Giangregorio, he fails to mention that these two jurors in his supplemental briefs and we assume he is conceding that, in light of the different standard established in *Will*, the record no longer supports his claims that their excusal was improper. Our review of the record supports such a determination.

13. Dr. Loftus testified outside the jury's prsence at defendant's first tiral. The parties stipulated that the transcript of this testimony, together with a copy of the prosecutor's legal memorandum on this point, could be considered by the trial court before ruling on the admissibility of Dr. Loftus's testimony in defendant's second trial.

whether any particular identification was accurate but only that these six factors are known to affect the accuracy of eyewitness identifications in general. Moreover, she opined that the information she would provide was beyond the common experience of most jurors and that her testimony could be of assistance to the jury.

The prosecutor objected to Dr. Loftus's proposed testimony, contending that the accuracy of eyewitness identifications was a matter of common sense for the jury, that Dr. Loftus could not testify as to the accuracy of any particular identification, and that cross-examination coupled with appropriate jury instructions would form an adequate basis from which the jury could decide whether or not to rely on Boender's identification of defendant. In addition, the prosecutor cited several cases in which the type of expert testimony the defense offered had been excluded. The trial court, although finding Dr. Loftus qualified to testify as an expert and that her testimony would not consume an undue amount of time, sustained the prosecution's objection.

As both defendant and the People acknowledge, the resolution of this issue is controlled by *People* v. *McDonald* (1984) 37 Cal.3d 351 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011], filed after defendant's trial. McDonald involved the murder of Jose Esparza on a public sidewalk, viewed from varying distances by seven witnesses who identified McDonald as the killer. McDonald offered the testimony of Dr. Shomer, who "proposed to inform the jury of various psychological factors that may affect the reliability of eyewitness identification, and to 'help to counter some common misconceptions' about the process." (*Id.* at p. 361.) Specifically, Dr. Shomer would have testified that the following factors affected the reliability of eyewitness identifications: "the observer's state of mind, his expectations, his focus of attention at the time, the suddenness of the incident, the stressfulness of the situation, and the differences in the race and/or age of the observer and the observed." (*Ibid.*) Following a line of appellate

decisions that upheld the exclusion of such evidence,[14] the trial court in McDonald excluded Dr. Shomer's testimony. The defendant was convicted of murder and sentenced to death.

We reversed. **(12)** "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*McDonald, supra*, 37 Cal.3d at p. 377.) However, exclusion of such evidence requires reversal only if it results in a miscarriage of justice. (*People* v. *Brown* (1985) 40 Cal.3d 512, 526-527 [220 Cal.Rptr. 637, 709 P.2d 440]; *McDonald, supra*, at p. 376; see also *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

(11b) Although an appellate court should, in the usual case, defer to a trial court's decision. admitting or excluding expert testimony (*McDonald, supra*, 37 Cal.3d at p. 377), the trial in defendant's case took place prior to our decision in *McDonald* and the trial court took no guidance from the reasoning therein. Even assuming arguendo the trial court erred in excluding the proffered expert testimony, however, we find the error was harmless.

We begin by noting that several of the critical factors identified in McDonald are present in this case. Boender's identification of defendant was indisputably a "key element" of the People's case. Also, there is no dispute that Dr. Loftus was a qualified expert on the subject of eyewitness identifications.

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14. The trial court in *McDonald* cited four cases in support of its decision: *People* v. *Johnson* (1974) 38 Cal.App.3d 1 [112 Cal.Rptr. 384]; *People* v. *Guzman* (1975) 47 Cal.App.3d 380 [121 Cal.Rptr. 69]; *People* v. *Brooks* (1975) 51 Cal.App.3d 602 [124 Cal.Rptr. 492]; and *People* v. *Bradley* (1981) 115 Cal.App.3d 744 [171 Cal.Rptr. 487]. (*McDonald, supra*, 37 Cal.3d at p. 362 & fn. 8.) The trial court in the instant case also relied on some of these cases in excluding Dr. Loftus's testimony.

We thus must examine whether Boender's identification was "substantially corroborated" such that it had "independent reliability." Once again, *McDonald* is instructive.

In *McDonald, supra*, 37 Cal.3d 351, no evidence linked the defendant to the crime other than the eyewitness identifications. The eyewitnesses in *McDonald* were equivocal, voicing various degrees of certainty, with one actually asserting that the defendant was definitely not the killer. Finally, the defendant had a strong alibi defense: several witnesses testified that he was in Alabama on the day of the killing and their testimony was supported by physical evidence in the form of dated postcards and phone bills. The identifications therefore were not corroborated by evidence giving them independent reliability.

In the present case, by contrast, Boender was positive that defendant was one of the two assailants and his identification was bolstered by (1) his recognition of defendant from the botched robbery attempt two days earlier; (2) Maxwell's statement to police, which dovetailed with Boender's description of the crimes and gave defendant a motive to kill Boender; and (3) Maxwell's descriptions of defendant and Cebreros, which matched Boender's descriptions of the assailants given to police the day after Allen's murder. Although Maxwell was admittedly not the most veracious witness, we cannot agree with defendant that her testimony must be wholly disregarded. To the extent Maxwell's testimony was consistent with Boender's version of events, it provides some corroboration for Boender's eyewitness identification of defendant.

Moreover, unlike in McDonald, physical evidence linked defendant to the crime. The baggie of marijuana found in Cebreros's possession was identical to that taken from Boender's apartment. In addition, the gun found in his possession was similar to the one that Boender described as having been wielded by defendant. Finally, the roll of duct tape bore defendant's fingerprints, thus supporting Maxwell's story that

defendant planned to use it to bind Boender during the January 21st robbery attempt. Although none of these items points unerringly towards defendant's guilt, they constitute links in the chain of evidence against him and thus provide some corroboration of Boender's identification of defendant as the guilty party.

Due to the strength of the evidence corroborating Boender's eyewitness identification of defendant, we cannot conclude the trial court's exclusion of his proffered expert evidence resulted in a miscarriage of justice. (*McDonald, supra*, 37 Cal.3d at p. 376.) Even assuming error, it was harmless.

(13a) In a related claim, defendant contends the trial court abused its discretion when, during voir dire, it sustained the prosecutor's objection to defense questions that sought to elicit the opinions of potential jurors concerning the effects of stress on perception. Defendant argues that these questions would have demonstrated that the information Dr. Loftus sought to impart was not within the common knowledge of the jury, thereby undercutting a potential justification for excluding her testimony.

(14) The purpose of questioning at voir dire, however, is to assist the attorneys in the exercise of their peremptory challenges, not to provide foundational support for their evidentiary motions. "[C]ounsel should be allowed to ask questions reasonably designed to assist in the *intelligent exercise of peremptory challenges* whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause." (*People* v. *Williams* (1981) 29 Cal.3d 392, 407 [174 Cal.Rptr. 317, 628 P.2d 869], italics added.) (13b) Because the challenged questions at voir dire were not related to aiding the exercise of peremptory challenges but instead were intended to support defendant's position on an evidentiary question, no abuse of discretion occurred.

Defendant apparently recognizes the weakness of his argument by suggesting that responses to his voir dire questions would have helped him decide which jurors to challenge by

exposing whether they were aware of the information Dr. Loftus would have offered. Although defendant thus claims the questions would have assisted in the exercise of his peremptory challenges, he is basically asserting that if the trial court excluded Dr. Loftus's testimony on the ground that it was within the common experience of the jury, then he was entitled to prove through questioning of the jurors that the trial court's assumption was incorrect. As we have explained, this is not a proper subject of questioning on voir dire.

2. *Boender's Identification of Cebreros*

The day after the murder, police questioned Boender at the hospital. He described the larger of his assailants as over six feet tall, weighing over two hundred pounds, with dark hair thinning on top and combed straight back. Boender also noticed the man carried his arms noticeably away from his body and looked like a "biker." This description was very similar to Maxwell's description of Cebreros, given to police the night before. After Cebreros was arrested, police displayed a stack of photographs to Boender, who, upon seeing the picture of Cebreros, exclaimed, "This is the big guy; I'm sure of it." Maxwell also identified Cebreros from a photographic lineup. Cebreros is six feet, five inches tall, weighs two hundred and twenty pounds, and has hair as described by Boender. After Cebreros was arrested, Boender identified defendant from a separate photographic lineup.

Defendant moved to suppress Boender's out-of-court identification of him, claiming the circumstances under which Boender selected his photograph were unduly suggestive. Cebreros made a similar motion as to Boender's identification of him. The trial court denied both motions, although it noted that the photographic array that included Cebreros left "a great deal to be desired" because his picture was the only one in the display that matched Boender's description of the larger assailant. The court stated, however, that, after considering all

the facts and circumstances of the case, it could not conclude that there was "a very substantial likelihood of irreparable misidentification." (*Simmons* v. *United States* (1968) 390 U.S. 377, 384 [19 L.Ed.2d 1247, 1253, 88 S.Ct. 967].)

(15a) Defendant now attacks the validity of the pretrial identification of Cebreros, arguing that because other evidence linked the two men in the commission of the crimes, the prosecution was able to unfairly bolster its case against defendant by using Boender's questionable identification of Cebreros. Defendant's claim fails at the threshold because it does not appear he joined in Cebreros's motion to suppress in the trial court or otherwise objected to the introduction of Boender's identification of Cebreros. (Evid. Code, § 353.) Because the alleged flaw in Cebreros's photographic lineup was that his picture was the only one that matched the witnesses' description, defendant's own motion to suppress cannot be fairly read to encompass the theory on which Cebreros's motion was made.

Even assuming the issue was properly preserved for appeal, reversal is not required. **(16)** "[A] violation of due process occurs if a pretrial identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' [Citations.] 'Whether due process has been violated depends on "the totality of the circumstances" surrounding the confrontation. [Citation.]' The burden is on the defendant to show that the identification procedure resulted in such unfairness that it abridged his rights to due process. [Citation.]" (*People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 12 [179 Cal.Rptr. 249]; see also *People* v. *Blair* (1979) 25 Cal.3d 640, 659 [159 Cal.Rptr. 818 [602 P.2d 738].)

(17) "The factors to be considered in determining whether a lineup is impermissibly suggestive include the opportunity of the witness to view the criminal at the scene of the crime, the witness' degree of attention, the accuracy of the prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the

confrontation, as well as the suggestiveness of the procedure employed. (*Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114.)" (*Sequeira, supra,* 126 Cal.App.3d at pp. 12-13.)

(15b) In this case, Boender testified he clearly viewed his assailants and he focused on his attackers' faces in order to identify them if he survived the attack. He was certain of his identification of Cebreros, who matched both his and Maxwell's descriptions of the larger of the two assailants. Only two days passed between the crime and Boender's selection of Cebreros's picture from the photographic array. Although the Cebreros photographic array was somewhat suggestive, we agree with the trial court that the totality of the circumstances does not demonstrate that there was "a very substantial likelihood of irreparable misidentification." (*Simmons* v. *United States, supra*, 390 U.S. at p. 384 [19 L.Ed.2d at p. 1253].)

3. *Felony-murder Instructions*

The People presented the jury with six potential first degree murder theories. In addition to being instructed that it should return a verdict of first degree murder if it found defendant premeditated and deliberated the killing, or killed during a robbery, the jury was also instructed that it could return a verdict of first degree murder if it found the murder was committed during a burglary in which defendant entered Boender's home with the intent to (1) steal, (2) commit an assault, (3) falsely imprison the victims, or (4) dissuade the victims from testifying.

(18a) Defendant correctly contends, and the People now concede, that it was error to instruct the jury that it might convict of first degree murder if it found the killing occurred during a burglary in which defendant's intent was to commit an assault. "In [*People* v.] *Ireland* [(1969) 70 Cal.2d 522 [75 Cal.Rptr. 188 (450 P.2d 580, 40 A.L.R.3d 1323)], we rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second

degree felony-murder instruction. We conclude that the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation." (*People* v. *Wilson* (1969) 1 Cal.3d 431, 441 [82 Cal.Rptr. 494, 462 P.2d 22].) **(19)** We thus concluded that "a burglary based on intent to assault ... cannot support a felony-murder instruction." (*Ibid.*; see also *People* v. *Smith* (1984) 35 Cal.3d 798, 804 [201 Cal.Rptr. 311, 678 P.2d 886].)

(18b) Although the instruction was erroneous, we agree with the People that the error did not prejudice defendant. **(20)** The jury was presented with five legally permissible theories of guilt and one legally impermissible theory. In such circumstances, the applicable rule on appeal is clear: reversal is required only if the reviewing court cannot determine from the record on which theory the jury relied. (*People* v. *Green* (1980) 27 Cal.3d 1, 69 [164 Cal.Rptr. 1, 609 P.2d 468].) Two cases illustrate this point.

In *People* v. *Ainsworth* (1988) 45 Cal.3d 984 [248 Cal.Rptr. 568, 755 P.2d 1017], the jury was instructed on at least three theories of first degree murder: premeditation, robbery-felony-murder, and rape-felony-murder. (*Id.* at p. 1015 & fn. 16.) The defendant contended there was insufficient evidence to support the instructions on premeditation and rape-felony-murder and invoked the Green rule in urging that we reverse. He conceded, however, that there was sufficient evidence to support the robbery-felony-murder theory and, significantly, the jury sustained a robbery-murder special-circumstance allegation. Thus, we were "able to determine from the record — specifically, the jury's finding of a robbery special circumstance — that the jurors agreed on that theory at least in reaching their verdict." (*Id.* at p. 1015.) Because the first degree murder verdict was sustainable on the theory that the defendant killed during the commission of a robbery, we affirmed.

People v. *Boyd* (1985) 38 Cal.3d 762 [215 Cal.Rptr. 1, 700 P.2d 782] is in accord. In *Boyd*, the jury was presented with alternate theories of murder: felony murder and premeditation. Although the defendant argued there was insufficient evidence to justify an instruction on premeditation (*id.* at p. 769), we concluded any error was harmless, reasoning that "the jury which found defendant guilty of first degree murder simultaneously returned a verdict finding as a special circumstance that defendant committed that murder during the commission of attempted robbery. Those findings make it clear that whatever the jurors thought about premeditation, they agreed upon all of the elements necessary for a verdict of first degree murder based on a felony-murder theory." (*Id.* at p. 770.)

(18c) In the instant case, the jury was presented with one legally objectionable theory of first degree murder and several permissible theories. Pursuant to other, properly given instructions, the jury found beyond a reasonable doubt that defendant committed a robbery and that he was guilty of the robbery-felony-murder special circumstance. As in *Ainsworth, supra*, 45 Cal.3d 984, and *Boyd, supra*, 38 Cal.3d 762, we can conclude that, at the very least, the jury reached its verdict of first degree murder under one legally proper theory. Under such circumstances, there is no miscarriage of justice under article VI, section 13 of the state Constitution and reversal is not required. (Cf. *People* v. *Lee* (1987) 43 Cal.3d 666, 675, fn. 1 [238 Cal.Rptr. 406, 738 P.2d 752].)

4. *Accomplice Instructions*

The trial court also read to the jury the standard instructions defining accomplices and detailing the corroboration requirement of section 1111. (See CALJIC Nos. 3.10-3.12.) It then instructed that if anyone was guilty of the January 21 robbery attempt, then Brenda Maxwell was an accomplice as a matter of law (CALJIC No. 3.16) and that the testimony of accomplices should be viewed with distrust (CALJIC No. 3.18).

As to the January 23 crimes (i.e., the murder of Allen, the attempted murder of Boender, the robbery and the burglary), the jury was instructed that it must determine whether Maxwell was an accomplice and that defendant had the burden of proving that fact by a preponderance of the evidence.

(21a) Defendant argues Maxwell was an accomplice to all the crimes and that the trial court erred by leaving to the jury the question of whether she was an accomplice for the January 23 crimes. We disagree. **(22)** When the evidence concerning whether a witness was an accomplice to a crime is undisputed, it is a question of law for the trial judge to decide. (*People* v. *Hoover* (1974) 12 Cal.3d 875, 880 [117 Cal.Rptr. 672, 528 P.2d 760].) However, "if the facts are disputed or susceptible of different inferences, the question whether the witness is an accomplice should be submitted to the jury." (*People* v. *Mayberry* (1975) 15 Cal.3d 143, 159 [125 Cal.Rptr. 745, 542 P.2d 1337].) **(21b)** Here, the evidence that Maxwell was an accomplice to the January 23 crimes was not strong. although defendant argues the bungled robbery attempt two days earlier provided her with a motive to commit the January 23 crimes, the most that may be said is that the material facts were in dispute as to whether Maxwell was an accomplice to those crimes. The trial judge thus properly submitted the matter to the jury.[15/]

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15. The cases cited by defendant are not on point. In *People* v. *Dail* (1943) 22 Al.2d 642 [140 P.2d 828], the trial court erroneously instructed the jury that the credibility of accomplice witnesses should be judged by the same standard as other witnesses. (*Id.* at p. 656.) By contrast, the trial court here properly instructed the jury that the testimony of an accomplice must be viewed with distrust and must be corroborated. In *People* v. *Robinson* (9164) 61 Cal.2d 373 [38 Cal.Rptr. 890, 392 P.2d 970], also cited by defendant, we reversed a conviction where, among other things, the trial judge erroneously left to the jury the determination of whether the witness was an accomplice when there was overwhelming evidence of that fact. (*Id.* at pp. 694-696.) As explained *ante*, the evidence showing Maxwell was an accomplice in the January 23 crimes was not strong. Hence, the question properly was one for the jury. (*Mayberry, supra,* 15 Cal.3d at p. 159.)

Moreover, even assuming arguendo that the trial court should have instructed the jury that all of Maxwell's testimony was subject to the corroboration requirement, the record reveals Maxwell's testimony was adequately corroborated in all respects. Her descriptions of defendant and Cebreros were accurate and very similar to Boender's descriptions. Her claim that she, defendant, and Donna Thompson met Cebreros outside a Jefferson Street house checked out: police arrested Cebreros outside that same house. Finally, her story describing the planned robbery was corroborated by defendant's fingerprint on the roll of duct tape the group planned to use to bind Boender after subduing him. Thus, even if the court erred, it is not reasonably probable that the jury would have reached a different result in the absence of the error. (*Mayberry, supra*, 15 Cal.3d at p. 159 [applying the *Watson* (*supra*, 46 Cal.2d 818) standard of prejudice].)

5. *Miranda Waiver*

Prior to his first trial, defendant moved to suppress his statements to police, claiming his *Miranda*[16/] waiver was invalid because Officer Herman failed to inform him of the nature of the charges against him. At the hearing on the motion, Officer Herman testified that on January 29, 1981, he and Officer Vincent located defendant and escorted him to the police station. After entering an interview room, Herman testified he informed defendant that he wished to speak to him about a homicide and read him his *Miranda* rights. Defendant waived his rights and recounted his whereabouts during the previous seven days.

Defendant testified in support of his motion to suppress and stated that he answered Herman's questions in the interview

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16. *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

room for approximately an hour before Herman read him his *Miranda* rights and informed him that he was being investigated for a homicide. The trial court thereafter denied the suppression motion, and defendant's statements were introduced at trial. In closing argument, the prosecutor noted that defendant's statements to Officer Herman were inconsistent with his defense at trial that he spent the night of the murder at Salvador Cebreros's home playing chess and drinking beer.

(23) (See fn. 17.)[17/] Defendant renews his contention that Officer Herman's failure to inform him of the charges against him precludes a finding that he knowingly and intelligently waived his *Miranda* rights.17 **(24)** Although we are aware that a colorable argument may be made that a *Miranda* waiver is not knowing or intelligent where the suspect is ignorant of the charges against him (see *People* v. *Boyde* (1988) 46 Cal.3d 212, 240 [250 Cal.Rptr. 83, 758 P.2d 25] [acknowledging the argument]; but see *People* v. *Neely* (1979) 95 Cal.App.3d 1011, 1017 [157 Cal.Rptr. 531] [rejecting the claim]), this very contention was recently considered and rejected by the United States Supreme Court.

In *Colorado* v. *Spring* (1987) 479 U.S. 564 [93 L.Ed.2d 954, 107 S.Ct. 851], the defendant was arrested on a firearms charge,

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17. "*Miranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waive." (*Moran* v. *Burbine* (1986) 475 U.S. 412, 421 [89 L.Ed.2d 410, 421, 106 S.Ct. 1135], quoting *Fare* v. *Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2d 197, 212-213, 99 S.Ct. 2560].) Defendant makes no claim that his statements to Officer Herman were involuntary.

waived his *Miranda* rights, and agreed to speak to police. He was then questioned about a prior murder. He claimed at trial that the failure to advise him that he was suspected of the murder invalidated his *Miranda* waiver and required suppression of the statements he made to police about the murder. Although both the Colorado Court of Appeals and the Colorado Supreme Court agreed with him, the United States Supreme Court reversed, holding that "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. [Citations.] The Fifth Amendment's guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect." (*Id.* at p. 574 [93 L.Ed.2d at p. 966].)

Thus, "a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might ... affec[t] his decision to confess.' [Citation.] '[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.'" (*Colorado* v. *Spring, supra*, 479 U.S. at p. 576 [93 L.Ed.2d at 967], quoting *Moran* v. *Burbine, supra*, 475 U.S. at p. 422 [89 L.Ed.2d at p. 421].) Finding no evidence that the defendant "misunderstood the consequences of speaking freely to law enforcement officials" (*Spring, supra*, at p. 575 [93 L.Ed.2d at p. 966]), the high court concluded that "the trial court was indisputably correct in finding that *Spring*'s waiver was made knowingly and intelligently within the meaning of *Miranda*." (*Ibid.*)

Defendant's claim that his Miranda waiver was invalid thus fails even if we accept his version of the facts. As in *Colorado* v. *Spring, supra*, 479 U.S. 564, we conclude defendant was adequately informed of his Fifth Amendment rights and executed a valid waiver of them before speaking to Officer

Herman.[18]

Finally, we decline defendant's invitation to exclude his extrajudicial statements by relying on our state Constitution. (See Cal. Const., art. I, § 15 ["Persons may not ... be compelled in a criminal cause to be a witness against themselves"].) Although we are not precluded by article I, section 28, subdivision (d) of the state Constitution from establishing a new exclusionary rule in this case (see *People* v. *Smith* (1983) 34 Cal.3d 251 [193 Cal.Rptr. 692, 667 P.2d 149] [art. I, § 28,subd. (d) only applies to crimes committed after its passage]), we are persuaded by the reasoning of the high court in *Colorado* v. *Spring, supra*, 479 U.S. 564, and conclude defendant's statements were properly admitted.

6. *Admission of Photographs*

Defendant objected at trial to the admission into evidence of two photographs of Allen. The first photograph depicts the victim lying on the bedroom floor as she was found by police. The second photograph was taken during the autopsy and depicts the extent of the victim's head wound. Responding to the objection, the prosecutor asserted the photographs were "admissible not only on the issue of heinous, atrocious and cruel murder but the circumstances of the killing where it took place in the apartment, the manner in which it was done has some relevance to this case, some substantial relevance to this case I think, and I would offer it on that basis also." The trial court overruled the objection, stating, "I don't think this photograph

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18. Although defendant would distinguish *Spring* because the police questioning in that case itself "suggested the topic of inquiry" (*id.* at p. 568 [93 L.Ed.2d at p. 962]), it is clear that only the *trial court* in *Spring* found this point important. (*Ibid.*) As noted above, the high court instead reasoned that an accused can execute a valid *Miranda* waiver even if he is not previously informed of all possible consequences of that decision. (*Id.* at p. 574 [93 L.Ed.2d at p. 966].) We thus reject defendant attempt to distinguish *Spring* on its facts.

is outrageous and inflammatory and I think it is relevant and probative."

(25) "The admission of photographs of a victim lies within the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect." (*People* v. *Carrera* (1989) 49 Cal.3d 291, 329 [261 Cal.Rptr. 348, 777 P.2d 121]; see *People* v. *Phillips* (1985) 41 Cal.3d 29, 54 [222 Cal.Rptr. 127, 711 P.2d 423].)

(26) Defendant first argues reversal is required because admission of the photographs was premised "primarily" on their relevance to the now discredited "heinous, atrocious and cruel" special circumstance set forth in section 190.2, subdivision (a)(14). (*People* v. *Superior Court (Engert)* (1982) 31 Cal.3d 797 [183 Cal.Rptr. 800, 647 P.2d 76]; see also *Maynard* v. *Cartwright* (1988) 486 U.S. 356 [100 L.Ed.2d 372, 108 S.Ct. 1853] [holding a similarly worded aggravating circumstance under Oklahoma law unconstitutionally vague under the Eighth Amendment].) The prosecutor, however, offered the evidence on two distinct theories, namely, that the photographs were relevant to both the special circumstance allegation and to the circumstances of the crime. Although we have since found the "heinous, atrocious and cruel" special circumstance constitutionally infirm (*Engert, supra*), the challenged evidence was clearly admissible on the remaining theory. The first photograph was relevant in indicating "the manner in which the crime had been committed." (*People* v. *Thompson* (1988) 45 Cal.3d 86, 115 [246 Cal.Rptr. 245, 753 P.2d 37]; see also *People* v. *Allen* (1986) 42 Cal.3d 1222, 1256 [232 Cal.Rptr. 849, 729 P.2d 115] [photographs corroborated testimony of a witness as to "location and manner in which the victims were shot"].) The second photograph, taken at the autopsy, corroborated the testimony of the medical experts regarding the nature of the fatal blow. (See *Carrera, supra,* 49 Cal.3d at p. 329; *Thompson, supra*, at p. 115.)

We agree, however, that in ruling on defendant's Evidence

Code section 352 objection, the trial court's consideration of the relevance of the photographs to the now invalidated heinous, atrocious and cruel special-circumstance allegation may have prevented an accurate assessment of the probative value of the evidence balanced against the potential prejudice. Even assuming error, however, reversal is not required. That the evidence of guilt was strong is underscored by the dual identifications of both defendant and Cebreros by Boender and Maxwell, corroborated by the physical evidence such as the baggie of marijuana in Cebreros's boot and defendant's fingerprint on the roll of duct tape. In addition, Maxwell's tale of the botched robbery attempt at her mobilehome, corroborated by Boender, provided the motive for the subsequent murder. Finally, we note the trial court found the photographs neither "outrageous" nor "inflammatory." As in *People* v. *Poggi* (1988) 45 Cal.3d 306, 323 [246 Cal.Rptr. 886, 753 P.2d 1082], "we cannot conclude that it is reasonably probable a result more favorable to defendant would have occurred in the absence of the error."

Finally, although defendant contends the trial court failed to exercise any discretion, his claim is belied by the trial judge's explicit ruling quoted above.

C. *Special Circumstance Issues*

The jury found true four special circumstance allegations against defendant: that the murder was committed while he was engaged in a robbery (§ 190.2, subd. (a)(17)(i)) and a burglary (*id.*, subd. (a)(17)(vii)), that Allen was killed to prevent her testimony (*id.*, subd. (a)(10)), and that the murder was heinous, atrocious, and cruel (*id.*, subd. (a)(14)). As we explain, two of these special circumstance findings must be set aside.

1. *The Felony-murder Special Circumstances*

(27) It is now settled that the jury may sustain a

felony-murder special-circumstance allegation against the actual killer without finding he acted with the intent to kill. (*People* v. *Anderson* (1987) 43 Cal.3d 1104, 1145-1147 [240 Cal.Rptr. 585, 742 P.2d 1306].) **(28)** In order to sustain a felony-murder special-circumstance allegation against an aider and abettor, however, the jury must still find he acted with the intent to kill. (*Ibid.*) **(29)** Defendant contends the two felony-based special-circumstance findings must be reversed because the jury was not instructed to determine whether he intended to kill Allen. He argues that the facts of this case do not show whether he or Cebreros was the actual killer. Thus, the jury may have sustained the robbery-murder and the burglary-murder special-circumstance allegations based on his possible role as an aider and abettor. If so, he argues, the failure to instruct on intent to kill requires reversal.

We disagree. Defendant's jury was given two instructions explaining the theory of aiding and abetting. First, in connection with the general principles of the case, the jury was instructed that "A person aids and abets the commission of a crime if with knowledge of the unlawful purpose of the perpetrator of the crime he *intentionally* aids, promotes, encourages, or instigates by act or advice the commission of such crime." (Italics added.) Later, in being instructed on the special circumstances, the jury was told: "If either defendant ... was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer *in the commission of the murder in the first degree* before you are permitted to find the alleged special circumstance of that first degree murder to be true as to that defendant." (Italics added.)

This latter instruction is indistinguishable from one this court approved in *People* v. *Warren* (1988) 45 Cal.3d 471 [247 Cal.Rptr. 172, 754 P.2d 218]. In that case, the defendant claimed that the instructions did not adequately require the jury to find he, an aider and abettor, acted with the intent to kill.

After stating the rule that intent to kill must be shown before a felony-based special-circumstance allegation can be sustained against an aider and abettor, we concluded that "a reasonable juror would understand the language of the instructions to declare that very rule: 'the defendant was ... a person who intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of murder in the first degree.' Therefore, the instructions, so understood, state the law correctly." (*Id.* at p. 487.)Because essentially the same instruction was given in the present case, we conclude that defendant's jury necessarily found defendant, if he was an aider and not the actual killer, acted with the intent to kill.

Defendant focuses on the felony-murder instructions to argue for a contrary conclusion. He notes the jury was also told that, for purposes of the felony-murder rule, the killing can be unintentional or even accidental so long as it occurs while the killer is engaged in an enumerated felony. Thus, defendant claims the jury may only have found he intentionally aided in the burglary and robbery with Allen's killing being merely accidental. If so, no intent to kill would be present.

We rejected this precise argument in *Warren, supra*, 45 Cal.3d at pages 487-488, finding no reasonable juror would interpret the jury instructions in such a "hypertechnical manner." Moreover, two other reasons support rejection of this contention. First, the special circumstance instruction on aiding and abetting mirrors the language in section 190.2, subdivision (b), and thus unambiguously sets forth the rule that "the aider and abetter must intentionally aid *in a killing*." (*Anderson, supra*, 43 Cal.3d at p. 1145, italics in original.) Thus, the instructions cannot reasonably be interpreted to require only aiding in a felony which forms the basis of a felony murder. Second, as explained post, the jury's verdict on the witness-killing special circumstance precludes a finding that the killing was unintentional. Thus, defendant could not have been convicted of intentionally aiding an accidental killing.

(30) Although not raised by defendant, the burglary-murder special circumstance must be set aside for the same merger problems discussed *ante*, at page 509, i.e., the jury instructions improperly permitted the jury to find a burglary based on defendant's intent to commit an assault. (*Wilson, supra*, 1 Cal.3d at p. 441; see generally *People* v. *Garrison* (1989) 47 Cal.3d 746, 788-789 [254 Cal.Rptr. 257, 765 P.2d 419] [striking two burglary-murder special circumstances for the same reasons despite the issue not being raised by defendant].)

2. *The Witness-killing Special Circumstance*

The jury sustained the special circumstance allegation set forth in section 190.2, subdivision (a)(10), i.e., that "[t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing [her] ... testimony in any criminal proceeding, and the killing was not committed during the commission ... of the crime to which [s]he was a witness." Defendant first contends we must reverse this finding because the jury was not instructed to find he acted intentionally, reiterating his argument that he may have merely aided Cebreros, the actual killer. As explained above, however, the instructions adequately required the jury to find the necessary intent for an aider and abettor.

(31) Second, defendant claims that before a jury may sustain a witness-killing special-circumstance allegation, there must be a pending criminal proceeding at the time of the killing. We rejected this argument in *People* v. *Weidert* (1985) 39 Cal.3d 836 [218 Cal.Rptr. 57, 705 P.2d 380], explaining that "if an accused believes himself to be exposed to criminal prosecution and intentionally kills another to prevent that person from testifying in an anticipated or pending criminal proceeding, the special circumstance may be found true whether or not an actual criminal proceeding was pending or about to be initiated." (*Id.* at pp. 853-854.)

(32) Defendant next claims the trial court confused the jury

by delivering an instruction defining the crime of dissuading a witness (§ 136.1) immediately before instructing the jury on the witness-killing special circumstance.[19/] Inasmuch as he was not charged with violating section 136.1, he claims that the instruction "may" have created "serious confusion" on the part of the jury. We disagree.

Before the challenged instruction was given, the jury was instructed on burglary, a charged offense. In addition to robbery, assault, and false imprisonment, dissuading a witness was listed as a possible felony that defendant intended to commit when he entered Boender's apartment. Thus, the challenged instruction explained a "general principle[] of law relevant to the issues raised by the evidence" and was "necessary for the jury's understanding of the case." (*People* v. *Wickersham* (1982) 32 Cal.3d 307, 323 [185 Cal.Rptr. 436, 650 P.2d 311], quoting *People* v. *Sedeno* (1974) 10 Cal.3d 703, 715-716 [112 Cal.Rptr. 1, 518 P.2d 913], internal quotation marks omitted.)

Defendant also asserts the potential for confusion was great because the crime of dissuading a witness carries different elements from the witness-killing special circumstance. Any potential confusion, however, was dispelled by the explicit instruction on the special circumstance. Thus, the instruction required, "One, that the person killed was a witness to a crime; two, that the witness was intentionally killed for the purpose of preventing his or her testimony in a criminal proceeding; and three, that the killing was not committed during the commission ... of the crime to which the person killed was a witness." Expressed in such a straightforward manner, we find the

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19. The instruction read, "Every person who knowingly and maliciously prevents or dissuades or attempts to prevent or dissuade a witness or victim from making a report of such victimization to any peace officer is guilty of a felony if such acts, one, are accompanied by force or by an express or implied threat of force to violence upon the witness or victim; or, two, where such acts are in furtherance of a conspiracy." This instruction is based on section 136.1, subdivision (c)(1), (2).

possibility that the jury sustained the special circumstance without finding these explicit elements is quite remote.[20/]

Defendant further argues that the potential for misleading the jury was heightened by the trial court's delivery of the instruction concerning dissuading a witness immediately before instructing on the witness-killing special circumstance. **(33)** However, "[t]he general rule is that the order in which instructions are given is immaterial" (*People* v. *Carrasco* (1981) 118 Cal.App.3d 936, 942 [173 Cal.Rptr. 688]; see also 21 Cal.Jur.3d (Rev.), Criminal Law, § 3052, p. 704), and the jury here was specifically instructed that "[t]he order in which these instructions are given has no significance as to their relative importance." We thus conclude the proximity of the challenged instruction to the instruction explaining the witness-killing special circumstance did not work to defendant's prejudice.

(34) Defendant next claims that section 190.2, subdivision (a)(10) should be read to require the jury to find that "but for" the intent to prevent Allen from testifying, she would not have been killed. Stated another way, he urges us to find that the statutory phrase"for the purpose of preventing his testimony"

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20. The jury was also given instructions defining a conspiracy, although defendant was not charged with that crime. This may have been to lay a foundation for a later instruction informing the jury how to evaluate a coconspirator's (i.e., Brenda Maxwell's) statements, or to present a vicarious liability theory based on defendant's and Cebreros's status as coconspirators. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 750 [248 Cal.Rptr. 126, 755 P.2d 310] [court can instruct on conspiracy even if not charged]; *People* v. *Washington* (1969) 71 Cal.2d 1170, 1174 [81 Cal.Rptr. 5, 459 P.2d 259, 39 A.L.R.3d 541] [same].) Defendant contends that the mention of a conspiracy may have led the jury to believe it could sustain the special circumstance allegation against him even if he only intended that Allen be intimidated but not killed. We need not resolve this problem, however, because as discussed *ante*, the instructions and the jury's verdicts show that it found defendant harbored the intent to kill. (Of course, there was sufficient evidence for the jury to find defendant himself struck the fatal blows and was thus the actual killer, not a mere aider and abettor.)

should be interpreted to mean "for the sole purpose of ...." He claims this interpretation is necessary to ensure that the special circumstance is not improperly enlarged to encompass one who kills when the elimination of a witness is merely incidental to the crime. (Cf. *Green, supra*, 27 Cal.3d 1 [commission of felony incidental to a killing cannot support felony-murder special circumstance].)

We reject defendant's attempted analogy to *Green, supra*. First, nothing in the legislative scheme indicates an intent to limit the scope of the witness-killing special circumstance as defendant suggests. The facts of this case are illustrative. Defendant's intent in killing Allen (and in attempting to kill Boender) was clearly twofold: he intended to rob them and to eliminate witnesses from the robbery attempt at Maxwell's trailer. To hold that the witness-killing special circumstance does not apply because defendant had a second reason to kill would unjustifiably reward him for having a criminal ambition greater than one who kills motivated solely by the desire to eliminate a witness.

Second, we cannot conceive of a situation in which the motive to kill a witness is merely "incidental" to the crime. Unlike the "technical" robbery committed by the defendant in *Green, supra*, 27 Cal.3d 1, when he took his victim's jewelry in order to conceal his identity as the murderer, the motive to kill a witness to a previous crime can never be incidental. We hold the plain meaning of the special circumstance is sufficiently limited: the trier of fact must find that the victim was killed "for the purpose of preventing his testimony."

(35) To the extent defendant is claiming there is insufficient evidence to support the witness-killing special circumstance, he is mistaken. Shortly after the botched attempt to rob Boender at Maxwell's mobilehome, defendant expressed concern that Boender could identify him. Defendant then sought out Cebreros, who "owed him a favor." A few days later, defendant and Cebreros appeared at Boender's apartment, bound and blindfolded Boender and Allen, moved them to separate rooms,

and struck both savagely on the back of the head. Allen died but Boender survived. From this evidence, the jury could infer that defendant intended to kill the two due to their ability to identify him as their assailant at Maxwell's home a few days earlier.

3. *The Heinous, Atrocious and Cruel Special Circumstance*

(36) Defendant also contends the jury's finding that the murder was heinous, atrocious and cruel (see § 190.2, subd. (a)(14)) must be set aside because the terms of that special circumstance are unconstitutionally vague. We agree. (*People* v. *Superior Court (Engert), supra*, 31 Cal.3d 797.)

D. *Penalty Phase Issues*

1. *Prejudicial Effect of Excessive Special Circumstances*

(37) Defendant claims the death penalty must be reversed because all four special circumstance findings are invalid. As explained *ante*, only two special circumstance findings — the so-called heinous, atrocious and cruel special circumstance and the burglary-murder special circumstance — must be set aside. although we assume defendant would argue that the jury's consideration of even one invalid special circumstance requires reversal of the penalty judgment, we disagree. The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors (*Zant* v. *Stephens* (1983) 462 U.S. 862 [77 L.Ed.2d 235, 103 S.Ct. 2733]), and this court is in accord. (See *People* v. *Silva* (1988) 45 Cal.3d 604, 632-636 [247 Cal.Rptr. 573, 754 P.2d 1070] [affirming despite the jury's consideration of invalid special-circumstance findings]; *Allen, supra*, 42 Cal.3d at pp. 1281-1283 [same].)

In this case, the jury properly considered two special circumstances (robbery-murder and witness-killing) and two

improper special circumstances (heinous-murder and burglary-murder). Although the prosecutor mentioned the heinous-murder special circumstance in closing argument, he did not heavily rely on it, instead choosing to stress the circumstances of the crime itself. (See *Allen, supra*, 42 Cal.3d at pp. 1279-1280.) After merely listing the four special circumstances the jury had sustained, the prosecutor addressed the applicable aggravating factors, noting Allen's killing was "a cold, calculated, callous act. You have already concluded and correctly so that it fell within the special circumstance known as especially heinous, atrocious and cruel murder, that it exhibited exceptional depravity ...."

Despite the latter statement, the prosecutor did not urge the jury to impose the death penalty merely because the crime could be categorized as heinous or atrocious, or because of the sheer number of special circumstances. (See *People* v. *Silva, supra*, 45 Cal.3d 604, 635.) Instead, he described and emphasized the circumstances of the crime, saying it was a "pitiless act committed against a young, defenseless woman in the prime of her life." Later, he argued that the jury could "also consider not only. the brutal murder of Janice Allen, but the vicious attack on Dale Boender two days before and [the] equally vicious attack on him the night of the murder of Janice Allen. *Those are circumstances and factors which you certainly should consider in this case.*" (Italics added.) As in *Silva, supra*, "we conclude a reasonable juror would not have been swayed by abstract concepts of 'heinous[, atrocious or cruel]' ... but would instead have focused on the actual circumstances of the offense which formed the foundation for finding those special circumstances to be true." (*Id.* at p. 635.)

Consideration of the invalid burglary-murder special circumstance was similarly benign. Again, the prosecutor did not focus on the bare number of special circumstance findings but urged the jury to consider the brutality of the crimes. Because virtually the same facts underlay both the burglary and robbery, and because the jury properly considered the

circumstances of the robbery-murder, there was little chance defendant was prejudiced by consideration of the burglary-murder special circumstance.

2. *Alleged Brown Error*

(38) Defendant maintains reversal of the penalty judgment is required because the jury was instructed that if it concluded "the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." (Italics added.) He claims this instruction impermissibly restricted the jury's sentencing discretion and directed a verdict of death.

In *People* v. *Brown, supra*, 40 Cal.3d 512, reversed on another issue sub nomine *California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837], we concluded use of the word "outweigh" in the statute "connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all the various factors he is permitted to consider, including [section 190.3,] factor 'k' as we have interpreted it [in *People* v. *Easley* (1983) 34 Cal.3d 858 (196 Cal.Rptr. 309, 671 P.2d 813)]. By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People* v. *Brown, supra*, at p. 541 [fn. omitted]; see also *People* v. *Hamilton* (1989) 48 Cal.3d 1142, 1181 [259 Cal.Rptr. 701, 774 P.2d 730]; *Allen, supra,* 42 Cal.3d at pp. 1276-1280.)

Whether the unadorned "shall" instruction requires reversal depends on the facts of each individual case. Every case "must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice

about the scope of its sentencing discretion under the 1978 law." (*People* v. *Brown, supra*, 40 Cal.3d at p. 544, fn. 17; *Allen, supra*, 42 Cal.3d at p. 1277.) Our inquiry on appeal requires us to consider whether the jury instructions, read in conjunction with the prosecutor's arguments, adequately informed the jury of "its weighing and decision-making responsibility." (*People* v. *Williams* (1988) 44 Cal.3d 1127, 1148 [245 Cal.Rptr. 635, 751 P.2d 901]; see also *Guzman, supra*, 45 Cal.3d at pp. 958-959.)

The jury was instructed with former CALJIC No. 8.84.1, which detailed the various aggravating and mitigating factors in the language of the statute and instructed the jury to "consider, take into account and be guided by" the factors. Former CALJIC No. 8.84.2 was also given. That instruction informed the jury it "shall" impose the death penalty if it found the aggravating circumstances "outweigh[ed]" the mitigating ones. No other instructions explaining the jury's role, such as an "expanded factor(k)" instruction (see *Guzman, supra*, 45 Cal.3d at pp. 956-958; *Easley, supra*, 34 Cal.3d at p. 878, fn. 10), were given.

Our first concern is whether the jury was led to believe it should merely count the various factors instead of evaluating the moral weight of each factor. (*Guzman, supra*, 45 Cal.3d at p. 959.) We find nothing in the record supporting this possibility. Nowhere did the prosecutor urge the jury to merely count the number of aggravating and mitigating factors and mechanically or arithmetically impose the death penalty. Although at one point the prosecutor stated, "There is nothing to weigh because everything falls on one side of the weighing process," this was a permissible observation of the state of the penalty phase evidence inasmuch as defendant declined to present any mitigating evidence. The clear import of this argument was that because of the great weight of the aggravating evidence compared to the dearth of mitigating evidence, death was the appropriate penalty. It is clear the prosecutor was not urging the jury to merely count the factors.

We thus turn to the question of "whether the jury understood that it was responsible for deciding for itself whether death is appropriate for the defendant." (*Guzman, supra*, 45 Cal.3d at p. 959, italics omitted.) The prosecutor began by stating that "It is the law of the State of California that in certain cases the penalty for first degree murder with special circumstances shall be the death penalty. [¶] This, ladies and gentlemen, is one of those cases." We find nothing improper in this statement. It merely restates the law that, for certain defendants convicted of murder, death is the appropriate penalty. This is true: for those defendants as to which a jury decides the aggravating circumstances outweigh the mitigating circumstances, the Penal Code provides that the appropriate penalty is death.

The prosecutor also explained the meaning of the word "shall" in the instructions, saying, "I emphasize the word 'shall' there because every single aggravating circumstance that the court will read to you is present in this case and there are no mitigating circumstances." He also stated that should the jury find the aggravating circumstances outweigh the mitigating ones, "then it is your duty as jurors to return the death penalty in this case."

This explanation, however, was qualified by language informing the jury to take the statutory factors into "consideration." The prosecutor also told the jury to "take into account those factors and be guided" by them. The prosecutor's argument thus fell short of divesting the jury of discretion or leading them to believe that it had no choice but to impose the ultimate penalty. Although he briefly emphasized the word "shall," that alone is not determinative. (See *Allen, supra*, 42 Cal.3d at p. 1279 & fn. 38.)

Defendant relies on two recent cases in which this court reversed penalty judgments for Brown error (*People* v. *Edelbacher* (1989) 47 Cal.3d 983 [254 Cal.Rptr. 586, 766 P.2d 1]; *People* v. *Crandell* (1988) 46 Cal.3d 833 [251 Cal.Rptr. 227, 760 P.2d 423]), but neither is persuasive. We reiterate that we must examine the entire record in each case to determine

whether "the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." (*People* v. *Brown, supra*, 40 Cal.3d at p. 544, fn. 17; *Allen, supra*, 42 Cal.3d at p. 1277.) While both cases cited by defendant have some similarity to the present case, there are significant differences. For example, the prosecutor in *Crandell* "portrayed the weighing process as being essentially an inquiry into whether the capital offenses were in any way justified or excused rather than a process for determining ... which of the two penalties was more appropriate." (*Crandell, supra*, at p. 884.) A similar interpretation was offered by the prosecutor in *Edelbacher, supra*, at page 1038.

By contrast, the prosecutor in defendant's case carefully went through each statutory factor, concluding that several were present and that no mitigating factors were apparent. In concluding death was the "proper" penalty, the prosecutor did not argue that the jury was divested of its discretion but that after weighing the statutory factors, the "proper" penalty was death. As in *Guzman, supra*, 45 Cal.3d 915, "we cannot agree that [the prosecutor's] statements, read as a whole, misinformed the jury about its weighing and sentencing discretion." (*Id.* at p. 960.)[21/]

3. *Failure to Present Mitigating Evidence*

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21. As Justice Mosk recognizes in his dissenting opinion, *post*, the United States Supreme Court recently filed two opinions that may affect our analysis of so-called *Brown* error. (*Boyde* v. *California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190]; *Blystone* v. *Pennsylvania* (1990) 494 U.S. 299 [108 L.Ed.2d 255, 110 S.Ct. 1079].) Both cases suggest that the premise of much of this court's reasoning in *Brown*--that capital juries should not be told their choice of sentence is mandatory if certain factual findings are made--may have been overstated. Because we find no error under *People* v. *Brown, supra,* 40 al.3d 512, and its progeny, however, we have no occasion to determine the impact of *Boyde* and *Blystone* on this case.

Following the jury's verdict of first degree murder with four special circumstances, defense counsel Hoover explained to the trial court that defendant wished that no mitigating evidence be presented on his behalf at the penalty phase of the trial. Mr. Hoover stated that "I believe [defendant's] position is that life without parole is unacceptable to him. He cannot accept that as an alternative whatsoever; and for that reason does not want me to ask the jury for that alternative. He does not consider it to be viable. He cannot reconcile it in his own mind. [¶] As I explained to the court, this again causes me a dilemma. This attitude is not new. It's something that hasn't just come up between us. [¶] I find that it differs substantially from my advice." After observing that he was unsure whether he had the power to present mitigating evidence over the express wishes of his client, Mr. Hoover requested the court appoint a medical expert to examine his client.

The trial court, concerned that defendant may have been relying on an erroneous belief that his chances for a reversal on appeal would be enhanced if he declined to participate in the penalty phase, asked defendant if that was the basis for his decision. Defendant replied in the negative, explaining that he had "approximately 20 reasons that I believe are my basic fundamental thought processes that I have believed in for most of my adult life and the feelings that I do have about life without parole is [that it is] unacceptable." The court then appointed Robert Cook, an experienced criminal defense attorney, to counsel defendant about his decision, as well as Dr. Matychowiak — apparently a psychiatrist — to examine him.

The parties returned to court a week later. Defendant had consulted with both Cook and Matychowiak[22/] but had not changed his mind about participating in the penalty phase of the trial. After noting that members of defendant's family were

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22. The trial court observed that it did not perceive defendant to be suffering from any mental aberration. Defense counsel concurred in this assessment.

present in court, the court questioned defendant further and discovered that he had instructed Mr. Hoover to refrain from cross-examining the prosecution's penalty phase witnesses. In addition, defendant stated he would not be himself addressing the jury.

When defendant was asked whether he desired the death penalty, Mr. Hoover explained: "[defendant] has indicated that he doesn't want me to do anything which would have the ultimate [effect] of receiving a sentence of life without the possibility of parole, a sentence which he finds to be as objectionable to him as the sentence of death and because of that reason, because of his feeling in this regard he would just as soon not present any evidence at this time." Mr. Hoover conceded that he did not believe defendant's position was irrational and that he believed defendant was sincere in his belief. Later, he underscored defendant's position: "I want to make the record clear that he is not requesting one sentence or the other. He finds both sentences objectionable ...."

The trial court tried one last time to persuade defendant to change his mind, asking, "Mr. Sanders, does it continue to be your position that you do not wish your counsel to ask any questions nor present any evidence in this penalty phase of the trial?" Defendant responded: "That is correct, your Honor." The prosecutor thereafter presented his penalty phase evidence. After the prosecutor gave his closing argument to the jury, Mr. Hoover waived argument and the case was submitted to the jury.

(39a) We have identified two potential theories which may cast doubt on a penalty verdict when a capital defendant decides to forgo presentation of mitigating evidence at the penalty phase. First, the absence of mitigating evidence may undermine "the state's interest in a reliable penalty determination." (*People* v. *Deere* (1985) 41 Cal.3d 353, 364 [222 Cal.Rptr. 13, 710 P.2d 925].) Second, a defense counsel's performance may be deemed constitutionally inadequate if he or she simply accedes to his client's wishes instead of "making an independent tactical

judgment about the presentation of the mitigating evidence." (*Williams, supra*, 44 Cal.3d at p. 1151; *Deere, supra*, at pp. 364-368.) Defendant relies on both theories in urging that we reverse the penalty judgment.

As to the state's independent interest in achieving a reliable penalty verdict, however, we recently concluded that a defendant's failure to present mitigating evidence generally does not render the verdict unreliable in the constitutional sense. "[T]he required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures,[23] and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements." (*People* v. *Bloom, supra*, 48 Cal.3d 1194, 1228; see also *People* v. *Lang* (1989) 49 Cal.3d 991, 1030 [264 Cal.Rptr. 386, 782 P.2d 627] [quoting *Bloom* with approval].)

(40) We have also disapproved of the suggestion in *Deere, supra*, 41 Cal.3d 353, that counsel necessarily provides constitutionally inadequate representation when he or she accedes to a client's wishes and declines to present available mitigating evidence at the penalty phase of a capital trial. (*Lang, supra*, 49 Cal.3d at pp. 1030-1031.) At least in the absence of

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23. We left open the possibility that the state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present available mitigating evidence, the jury was also given misleading instructions and heard misleading argument. (*People* v. *Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9 [259 Cal.Rptr. 669, 774 P.2d 698]; *Williams, supra*, 44 Cal.3d at p. 1152.) As we concluded, *ante*, at pages 521-524, the prosecutor's closing argument in this case was not objectionable and the jury instructions, although potentially misleading, did not actually deceive the jury into believing it lacked discretion regarding the choice of penalty.

evidence showing counsel failed to investigate available mitigating evidence or advise defendant of its significance (*id.* at pp. 1032-1033),[24] we cannot say defendant's trial attorney provided ineffective assistance of counsel.

Defendant notes that in contrast to other cases involving this issue (see e.g., *Williams, supra*, 44 Cal.3d at p. 1152; *Guzman, supra*, 45 Cal.3d at p. 961), he presented absolutely no mitigating evidence in this case. In addition, there was no defense closing argument and counsel did not even cross-examine the prosecution witnesses. (Defense counsel did register several objections during the questioning of the prosecutor's witnesses, however.) Thus, he argues, the jury was left with nothing to "weigh" against the People's penalty phase evidence, thereby effectively foreclosing a verdict of life without the possibility of parole.

In light of our recent decisions disapproving the reasoning of *Deere, supra*, 41 Cal.3d 353, we conclude these circumstances do not support a reversal of the penalty judgment. Defendant's knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase of his trial estops him from now claiming an entitlement to a reversal based on those decisions. (*Lang, supra*, 49 Cal.3d at pp. 1031-1032.)

(39b) Finally, defendant claims his decision to forgo presentation of evidence at the penalty phase of his trial was tantamount to a guilty plea without the consent of his counsel in violation of section 1018. That section states in pertinent part: "No plea of guilty of a felony for which the maximum

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24. Defendant contends his decision to decline to present any mitigating evidence was not a fully informed decision because he was not told that the trial court possessed the power to strike the special circumstances and thus make him eligible for parole. (*People* v. *Williams* (1981) 30 Cal.3d 470, 489 [179 Cal.Rptr. 443, 637 P.2d 1029].) This assertion is belied by the record, which shows that a defense motion to set aside the special circumstance findings was denied by the trial court prior to presentation of evidence at the penalty phase.

punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel."

We reject defendant's argument because we find the premise faulty: his decision to refrain from offering evidence is not tantamount to a guilty plea and is thus not governed by section 1018. His choice did not amount to an admission that he believed death was the appropriate penalty, nor did he give up his right to confront or cross-examine those testifying against him at the penalty phase. (Cf. *Boykin* v. *Alabama* (1969) 395 U.S. 238, 243 [23 L.Ed.2d 274, 279, 89 S.Ct. 1709]; *In re Tahl* (1969) 1 Cal.3d 122, 130-133 [81 Cal.Rptr. 577, 460 P.2d 449].) Moreover, his decision refusing to take part in the penalty phase did not necessarily make it any more likely that his jury would find death was the appropriate penalty. The jury could, for example, have found mitigating factors from evidence presented at the guilt phase.[25] We conclude the scope of section 1018 is not so broad as to embrace defendant's decision of nonparticipation in the penalty phase of his trial.

4. *Other issues*

a. *"No Sympathy" Instruction*

Prior to the guilt phase jury deliberations, the trial court instructed the jury not to be "swayed by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (See CALJIC No. 1.00.) Following the penalty phase, the jury was instructed: "You are reminded that you are to be guided by the previous instructions given in the first phase of the case which are applicable to this particular phase of the case."

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25. Capital juries are routinely instructed at the penalty phase that "you shall consider all of the evidence which has been received during any part of the trial of this case." (CALJIC No. 8.85.)

Defendant contends this latter instruction injected the "no sympathy" instruction into the penalty phase deliberations and improperly precluded the jury's consideration of any sympathetic factors shown by the evidence. We have rejected this argument in previous cases (*People* v. *Allison* (1989) 48 Cal.3d 879, 899, fn. 11 [258 Cal.Rptr. 208, 771 P.2d 1294]; *People* v. *Gates* (1987) 43 Cal.3d 1168, 1209 [240 Cal.Rptr. 666, 743 P.2d 301]), and defendant presents no reason why we should reconsider those decisions.[26]

b. *Dual Use of Underlying Crimes*

(41) Defendant asserts the trial court should have modified the standard penalty phase instruction to make clear that factor (b)[27] pertained to criminal activity other than that for which he was convicted in the present proceeding. By failing to modify the instruction, he claims the jury may have "double counted" the circumstances of his crimes against Boender and Allen when weighing the various factors during the penalty phase deliberations. We have previously rejected this argument (*People* v. *Ainsworth, supra*, 45 Cal.3d 984, 1032; *People* v. *Miranda, supra*, 44 Cal.3d at pp. 105-106) and, in any event, we find no possibility the jury was misled here. The record shows the prosecutor, in closing argument, clearly tied factor (b) to the evidence of the five armed robberies defendant committed in

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26. We also note that the United States Supreme Court has held that giving the antisympathy instruction at the penalty phase itself is not itself unconstitutional per se (*California* v. *Brown, supra,* 479 U.S. 538), although state law prohibits giving CALJIC No. 1.00 at the penalty phase. (*People* v. *Brown, supra*, 40 Cal.3d at p. 537, fn. 7.) Here, of course, the challenged instruction was not given at the penalty phase but at the guilt phase.

27. Section 190.3, factor (b) permits the jury to consider, as an aggravating or mitigating factor, "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

1970.

c. **Excessive Special Circumstances**

(42) Citing the plurality opinion in *People* v. *Harris, supra,* 36 Cal.3d 36, defendant contends the trial court erred by permitting the jury to consider both the robbery-murder and the burglary-murder special circumstances in its penalty deliberations. Harris reasoned that when the robbery and burglary were committed as part of an indivisible transaction, section 654[28] precludes a finding of multiple special circumstances. (36 Cal.3d at p. 65.)

We have since rejected the *Harris* plurality on this point. (*People* v. *Bean* (1988) 46 Cal.3d 919, 954-955 [251 Cal.Rptr. 467, 760 P.2d 996]; *People* v. *Melton* (1988) 44 Cal.3d 713, 765-769 [244 Cal.Rptr. 867, 750 P.2d 741].) Thus, "any robbery and burglary committed by defendant in the course of his homicidal conduct could properly be considered an independent aggravating factor. Each involved violation of [a] distinct interest that society seeks to protect, and a defendant who commits both offenses in the course of a murder may be deemed more culpable than a defendant who commits only one." (*Bean, supra*, at pp. 954-955.) Thus, the trial court did not err in permitting the jury to consider both special circumstances.

5. *Proportionality Review*

(43) Defendant submits this court must engage in both intracase and intercase proportionality review. Initially, he complains that because the People declined to seek the death

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28. Section 654 provides: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more that one . . . .

penalty against codefendant Cebreros, and because they never proved which of the two men was the actual killer, death is a constitutionally disproportionate penalty in this case. He also urges this court to undertake comparative sentence review, claiming we will find his crime much less serious than others for which only life terms were imposed.

We may quickly reject this latter argument: neither the federal nor the state Constitution compels comparative sentence review and we have in numerous cases declined to undertake such review. (*People* v. *Caro* (1988) 46 Cal.3d 1035, 1068 [251 Cal.Rptr. 757, 761 P.2d 680]; *People* v. *Poggi, supra*, 45 Cal.3d 306, 348; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; see *Pulley* v. *Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871].)

We also reject defendant's claim for relief based on a comparison of his sentence and the sentence imposed on Cebreros. Although the evidence of guilt was largely the same for the two defendants, the determination of penalty requires the jury to engage in a normative function, weighing "non-quantifiable" or intangible aspects of both the crime and the criminal. (*Allen, supra*, 42 Cal.3d at p. 1287.) Thus, "[t]he peculiarly normative and individualized nature of the jury's sentence determination in each case makes it inappropriate and of no benefit to consider the sentence imposed in superficially similar cases for the purpose of determining the prejudicial effect of error." (*People* v. *Malone* (1988) 47 Cal.3d 1, 57, fn. 31 [252 Cal.Rptr. 525, 762 P.2d 1249]; see also *People* v. *Dyer* (1988) 45 Cal.3d 26, 69-71 [246 Cal.Rptr. 209, 753 P.2d 1] [rejecting this precise argument].)

Moreover, we observe that of the two assailants, defendant was the one with the motive to silence Boender and Allen; he — and not Cebreros — was the one armed with a firearm. On the state of the evidence he was as likely as Cebreros to have been the actual killer and the jury found, at least impliedly, that he acted with the intent to kill, and that he had committed five prior armed robberies. Thus, even were we disposed to find

significance in the fact that Cebreros received a life sentence, we cannot conclude that defendant's death sentence is constitutionally suspect.

Finally, to the extent defendant is claiming his sentence is constitutionally disproportionate under article I, section 17 of the California Constitution (*People* v. *Dillon* (1983) 34 Cal.3d 441, 449-484 [194 Cal.Rptr. 390, 668 P.2d 697]; *In re Lynch* (1972) 8 Cal.3d 410, 423-429 [105 Cal.Rptr. 217, 503 P.2d 921]), we conclude that in light of the aforementioned facts of his case, his sentence is not disproportionate to his individual culpability.

III. Conclusion

The heinous, atrocious and cruel special circumstance, as well as the burglary-murder special circumstance, is set aside. The judgment as to both guilt and penalty is otherwise affirmed.

Panelli, J., Eagleson, J., Kennard, J., and Arabian, J., concurred.

MOSK, J.—I dissent.

In my view, the judgment should be reversed in its entirety. I agree with Justice Broussard that defendant's right to trial by a jury drawn from a representative cross-section of the community, which is guaranteed by both the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16, of the California Constitution, was violated in this case by the systematic underrepresentation of Hispanics. (See dis. opn. of Broussard, J., *post*, at pp. 538-543.)

Further, the judgment should be reversed as to penalty on separate and independent grounds. As I shall explain, the verdict of death should be vacated because of Deere error

(*People* v. *Deere* (1985) 41 Cal.3d 353 [222 Cal.Rptr. 13, 710 P.2d 925]) and also because of *Brown* error (*People* v. *Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440], revd. on other grounds sub nom. *California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]).

I

Defense counsel's failure to present available evidence in mitigation at the penalty phase resulted in a verdict of death that does not satisfy the heightened degree of reliability required by the Eighth Amendment to the United States Constitution and article I, section 17, of the California Constitution.

After the guilt phase, defense counsel stated in substance that at defendant's request and against his own best judgment, he would not participate in the penalty phase. He made it plain that he had mitigating evidence available: "[Defendant's] mother, his father, his grandmother and his sister are all here in this courtroom. I can put on the evidence." But he also made it plain that at defendant's request, he would not present such evidence.

At the penalty phase, the prosecution put on a case for death. Other than making a few objections, the defense did nothing at all.

In *People* v. *Deere, supra*, 41 Cal.3d 353, the court reversed a judgment of death on the ground that defense counsel's failure to present evidence in mitigation — although in accord with his client's wishes — rendered the penalty determination constitutionally unreliable. As I stated in my concurring and dissenting opinion in *People* v. *Williams* (1988) 44 Cal.3d 1127, 1158-1159 [245 Cal.Rptr. 635, 751 P.2d 901]:

"First, the [Deere] court determined that counsel's failure to present evidence in mitigation introduced error into the penalty proceeding.

"'To permit a defendant convicted of a potentially capital crime to bar his counsel from introducing mitigating evidence

at the penalty phase ... would ... prevent this court from discharging its constitutional and statutory duty to review a judgment of death upon the complete record of the case, because a significant portion of the evidence of the appropriateness of the penalty would be missing.

"'This deficiency of the record implicates another paramount concern of the state: "in capital cases ... the state has a strong interest in reducing the risk of mistaken judgments." ... Since 1976 the United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 961, 96 S.Ct. 2978] (plur. opn.).) And since 1978 the high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. (*Lockett* v. *Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954] (plur. opn. of Burger, C. J.).)

"'To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.' (41 Cal.3d at pp. 363-364.)

"Next, the [*Deere*] court determined that so long as 'the record ... demonstrates "the possibility that at least *someone* might have been called to testify on defendant's behalf and to urge that his life be spared"' (41 Cal.3d at p. 367, italics in original), the error introduced into the penalty proceeding by counsel's failure to present evidence in mitigation cannot be deemed harmless. The court explained:

"'When the sentencer in a capital case is deprived of all or a substantial part of the available evidence in mitigation, "the potential for prejudice is too obvious to require proof."

[Citation.] Indeed, "short of substituting a verdict of its own, there is no way for a reviewing court to determine what effect unpresented mitigating evidence might have had on the sentencer's decision." [Citation.] We have no doubt that a judgment of death imposed in such circumstances constitutes a miscarriage of justice (Cal. Const., art. VI, § 13): not only did defendant not have a fair penalty trial — in effect he had no penalty trial at all.' (41 Cal.3d at p. 368.)"

I turn now to the case at bar. On the face of the record it is plain that Deere error occurred: at defendant's request, counsel declined to present available evidence in mitigation, and indeed effectively declined to participate in any manner in the penalty phase.

It is also plain that the error here cannot be deemed harmless. As in Deere, "the record ... demonstrates 'the possibility that at least *someone* might have been called to testify on defendant's behalf and to urge that his life be spared.'" (*People* v. *Deere, supra*, 41 Cal.3d at p. 367, italics in original.) In this case, such potential witnesses were available, including defendant's father and mother, his grandmother, and his sister.

Accordingly, I would set aside the verdict of death as constitutionally unreliable and would reverse the judgment as to penalty. (See *People* v. *Deere, supra*, 41 Cal.3d at p. 368.)[1/]

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1. In finding no prejudicial error, the majority rely on the proposition that "'[T]he . . . reliability [required by the Eight Amendment in death penalty cases] is attained when;" --as assertedly here -- "'the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. . . .'" (Maj. opn. *ante*, at pp. 525-526, quoting *People* v. *Bloom* (1989) 48 Cal.3d 1194, 1228 [259 Cal.Rptr. 669, 774 P.2d 698], maj. opn. fn. omitted.) To my mind, that proposition is unsound. Reliability can be assured only when the record on which the verdict is based is "complete," i.e., when it does not lack any "significant portion of the evidence of the appropriateness of the penalty" that counsel reasonably concludes "'. . .

II

The trial court committed error under *People* v. *Brown, supra*, 40 Cal.3d 512, by instructing the jury in accordance with the mandatory sentencing language of the final paragraph of Penal Code section 190.3 (hereafter section 190.3).

The statutory provision declares: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances ..., and *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (Italics added.)

The instruction stated: "After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances ... [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." (Italics added.)

In *Brown* the court construed the final paragraph of section 190.3 as follows. "In [its] context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider .... By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating,

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makes the most compelling case in mitigation.'" (*People* v. *Deere, supra*, 41 Cal.3d at pp. 363, 364, fn. 3.) It is obvious that the record here is not "complete" in that sense.

the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case." (40 Cal.3d at p. 541, fn. omitted.)

Stated simply, the jury is "require[d] ... to make a moral assessment on the basis of the character of the individual defendant and the circumstances of the crime and thereby decide which penalty is appropriate in the particular case." (*People* v. *Bonin* (1989) 47 Cal.3d 808, 856 [254 Cal.Rptr. 298, 765 P.2d 460].) In other words, "The jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine, after consideration of the relevant factors, whether under all the circumstances 'death is the appropriate penalty' for the defendant before it." (*People* v. *Myers* (1987) 43 Cal.3d 250, 276 [233 Cal.Rptr. 264, 729 P.2d 698] (lead opn. by Grodin, J.).)[2/]

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2. In *Brown* the court construed the final paragraph of section 190.3 as it did for three reasons: (1) to "honor[] the plain language of section 190.3"; (2) to give effect to "the most likely ;constitutional' intent of the drafters"' and (3) to "avoid[] the constitutional difficulties of a finding that the statute permits 'mandatory' death penalties." (40 Cal.3d at p. 544.)

Very recently, in *Boyde* v. *California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190], the United States Supreme Court impliedly held not unconstitutional the final paragraph of section 190.3 to the extent that it requires that "the trier of fact . . . *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances 'outweigh' the mitigating circumstances." (Italics added.) (494 U.S. at pp. ___-___ [108 L.Ed.2d at p. 326, 110 S.Ct. at p. 1196].) In so doing, it relied primarily on *Blystone* v. *Pennsylvania* (1990) 494 U.S. 299 [108 L.Ed.2d 255, 110 S.Ct 1078], which it had decided less than a week earlier.

After careful review, I believe that *Boyde* gives us no reason to reconsider *Brown*.

To be sure, *Boyde* has removed one of the bases on which the court founded its construction of the statutory provision. It now appears that there

In *Brown*, however, the court recognized that a jury might not understand an instruction incorporating section 190.3's mandatory sentencing language in accordance with the construction of the provision that it had adopted. Specifically, the court acknowledged that the statutory language might mislead the jury as to the scope of their discretion to the defendant's prejudice. (40 Cal.3d at p. 544, fn. 17.) A juror might reasonably understand that language to define the penalty determination as "simply a finding of facts" (*id.* at p. 540) or "a mere mechanical counting of factors on each side of the imaginary 'scale'" (*id.* at p. 541). In other words, he might be misled as to the nature of the process by which penalty is determined. A juror might also reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation — even if he concludes that death is not the appropriate penalty under all the circumstances. (See *id.* at pp. 540-544.) That is to say, he might be misled as to the character of the ultimate question to be resolved in the process of determining penalty.

In deciding whether an instruction incorporating section

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are no "constitutional difficulties" inherent in a "statute [that] permits 'mandatory' death penalties." (40 Cal.3d at p. 544.)

But *Boyde* has had no effect whatever on the two other bases, i.e., "the plain language of section 190.3" and "the most likely 'constitutional' intent of the drafters" (40 Cal.3d at p. 544). Obviously, that decision does not change the words of the statutory provisions or their meaning. Moreover, it contains nothing to support a conclusion that the drafters of the provision may have intended to "anticipate" the law as stated therein. The primary authority on which *Boyde* relies–i.e., *Blysotone*–dates to 1990. By contrast, the drafters of section 190.3 did their work more than a decade earlier.

In my view, the construction of the final paragraph of section 190.3 that the court adopted in *Brown* retains its validity. From the reasoning in that decision it is manifest that the basis of statutory language and the drafters' intent are sufficient to support the interpretation set forth therein. Accordingly, *Boyde's* removal of the "avoidance of constitutional difficulties" basis is without effect for purposes here.

190.3's mandatory sentencing language would constitute error in a given case, the court has applied the so-called "reasonable juror" standard, which was suggested in Brown itself: could a juror have reasonably understood the charge to carry a meaning that was contrary to the governing law?[3/]

In this case, the trial court's instruction on the determination of penalty might indeed have misled the jury as to the scope of their discretion to defendant's prejudice. A reasonable juror could have understood the charge as requiring him simply to determine whether aggravating circumstances outweighed mitigating and then fix the penalty as the mandatory sentencing language directed. Review of the record discloses the following.

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3. In *People* v. *Marshall* (1990) 50 Cal.3d 907, 933, footnote 5 [269 Cal.Rptr. 269, 790 P.2d 676], the court stated as follows: "In *Boyde* v. *California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190], the United States Supreme Court held that 'The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence' under the Eight Amendment 'is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eight Amendment if there is only a possibility of such an inhibition.' (*Id* at pp. ___, ___ [108 L.Ed.2d at p. 329].) *It appears to follow that the same satandard is applicable for reviewing jury instructions claimed to restrict impermissibly a jury's sentencing discretion under the Eight Amendment."* (Italics added.)

That the so-called "reasonable likelihoot" standard may apply to a claim that a given instruction impermissibly restricted a jury's sentencing *under the Eighth Amendment* does not mean that that test should apply to a claim--like the present (see fn. 2, *ante*)--that a given instruction impermissibly restricted a jury's sentencing discretion *Under section 190.3*. The choice of the relevant standard here is plainly a matter of state law. I would adhere to the "reasonable juror" test. I certainly would not depart from it in favor of the "reasonable likelihood" test--which is manifestly both novel and unsound (*Boyde* v. *California*, *supra*, 494 U.S. at pp. ___, ___ [108 L.Ed2d at pp. 334-341, 110 S.Ct. at pp. 1202-1207] (dis. opn. of Marshall J.)).

To begin with, the trial court instructed the jury in accordance with the mandatory sentencing language of the final paragraph of section 190.3 without material modification. As noted, the statutory provision declares, "the trier of fact ... *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (Italics added.) The instruction stated, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." (Italics added.)

Moreover, in anticipation of the trial court's instruction, the prosecutor in his summation emphasized, and misleadingly explicated, the mandatory sentencing language. Indeed, he used that language to frame the "major premise" of his argumen If aggravation outweighs mitigation, you *must* impose death. Aggravation does, in fact, outweigh mitigation. Therefore, you *must* impose death."

The prosecutor opened his summation thus.

"Ladies and gentlemen, it now becomes your decision whether the penalty in this case to be imposed on Ronald Lee Sanders shall be death or life in the state prison without possibility of parole.

" * * *

"I know the decision that you have to make is not a pleasant one and I certainly wouldn't want you to take your job lightly. However, on the other hand, you have a sworn duty as jurors in this case to follow the law of this state as the court gives it to you when I have concluded my remarks.

"All of you told us during the jury selection process that you would not relish the idea of returning a death penalty verdict, however, you also told us that you could do so in the proper case.

"It is the law of the State of California that in certain cases the penalty for first degree murder with special circumstances shall be the death penalty.

"This, ladies and gentlemen, is one of those cases, ...

"* * *

"The court will read to you certain aggravating factors and certain mitigating factors which you should take into consideration in making your decision.

"The court will tell you that you should take into account those factors and be guided by those factors in your deliberation, and then the court will read you a very important instruction which you cannot ignore because of a duty to the People of the State of California as well as the defendant who is on trial here.

"This instruction reads as follows:

"*If you conclude that the aggravating circumstances in this case outweigh the mitigating circumstances, you shall impose the death penalty.* In other words, you have got to look at the circumstances, the factors that the judge reads to you, make a determination if the aggravating circumstances outweigh the mitigating circumstances.

"*If you conclude that they do, then it is your duty as jurors to return the death penalty in this case.*

"*I emphasize the word 'shall' there because every single aggravating circumstance that the court will read to you is present in this case and there are no mitigating circumstances.*

"There is nothing to weigh because everything falls on one side of the weighing process. Therefore, under the law the proper sentence in this case is in fact the sentence of death." (Italics added.)

The prosecutor then reviewed the statutory penalty factors and the evidence he claimed was relevant thereto. The gist of his argument was that aggravation was present and mitigation was absent.

Finally, the prosecutor closed his summation thus: "I will repeat that instruction to you again. *If you would conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death.* There are no mitigating circumstances in this case, and the proper penalty is the death penalty." (Italics added.)

In arguing as he did, the prosecutor delivered the message that the law required the jury simply to determine whether aggravating circumstances outweighed mitigating circumstances and then fix the penalty as the mandatory sentencing language directed. That message, of course, was erroneous. It incorrectly described the character of the ultimate question to be resolved in the process of determining penalty: "The jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination ...." (*People* v. *Myers, supra*, 43 Cal.3d at p. 276 (lead opn. by Grodin, J.); see, e.g., *People* v. *Bonin, supra*, 47 Cal.3d at p. 856; *People* v. *Brown, supra*, 40 Cal.3d at p. 541.) To my mind, a reasonable juror could not have ignored the prosecutor's words or missed their import.[4/]

Accordingly, I conclude that the trial court's instruction in accordance with the mandatory sentencing language of the final paragraph of section 190.3 might indeed have misled the jury as to the scope of their discretion to defendant's prejudice. Therefore, I would set aside the verdict of death and reverse the judgment as to penalty. (See, e.g., *People* v. *Farmer* (1989) 47 Cal.3d 888, 931 [254 Cal.Rptr. 508, 765 P.2d 940].)

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4. In concluding that the trial court did not commit *Brown* error, the majority rely on a reading o the summation that treats the prosecutor's comments on the mandatory sentencing language as sound and, in any event, discrete and insignificant. In light of the record set out above, such a reading is at the very least dubious. As explained, the prosecutor's remarks framed the "major premise" of his argument for death. Further, they misstated the law. The majority's assertion to the contrary notwithstanding, it is simply not the case that 'for those defendants as to which a jury decides the aggravating circumstances outweigh the mitigating circumstances, the Penal Code provides that the appropriate penalty is death." (Maj. opn., *ante*, at p. 523.) "The jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine, after consideration of the relevant factors, whether under all the circumstance 'death is the appropriate penalty' for the defendant before it." (*People* v. *Myers, supra*, 43 Cal.3d at p. 276 (lead opn. by Grodin, J.).)

III

For the reasons stated above, I would reverse the judgment in its entirety.

BROUSSARD, J.—I dissent. I agree with Justice Mosk that error relating to the instructions and argument at the penalty trial requires reversal of that verdict. (See *People* v. *Brown* (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440].) Two other errors also affect the judgment. First, the use of voter registration lists as the sole source for the master jury list deprived defendant of his constitutional right to trial by a jury drawn from a representative cross-section of the community (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16). Second, the trial court erroneously excluded for cause a prospective juror because of his generalized opposition to the death penalty, despite the lack of any showing that he could not conscientiously perform his duties as a juror in a capital case. (See *Witherspoon* v. *Illinois* (1968) 391 U.S. 510, 519 [20 L.Ed.2d 776, 88 S.Ct. 1770]; *Wainwright* v. *Witt* (1985) 469 U.S. 412, 431 [83 L.Ed.2d 841, 856, 105 S.Ct. 844], *People* v. *Stanworth* (1969) 71 Cal.2d 820, 837 [80 Cal.Rptr. 49, 457 P.2d 889].)

I.

Defendant made a prima facie showing that the system by which jury venires[1/] were selected in Kern County at the time of his trial produced venires that were substantially underrepresentative of the Hispanic population of the

1. As the majority notes (maj. opn., *ante*, p. 489, fn. 2), though defendant frames this issue in terms of a challenge to the assembly of the master jury list, defendant, trial court, and the People apparently understood the basis of the motion to be a challenge to the composition of Kern County jury venires.

community. Defendant argues that this system of jury selection violated his right to a jury drawn from a representative cross-section of the community under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16, of the California Constitution. The majority opinion rejects this argument, citing *People* v. *Bell* (1989) 49 Cal.3d 502, 520-531 [262 Cal.Rptr. 1, 778 P.2d 129].But this case is not the same as *Bell*. That decision required a defendant to prove not only that the system of selecting jurors underrepresented a cognizable group, but also to identify the probable source of the underrepresentation. (See p. 524.) Here defendant has done so, presenting proof that the county selected jurors exclusively from a source — the voter registration lists — known to underrepresent Hispanics. When a defendant does identify the source of the underrepresentation, as has the defendant here, the burden should shift to the prosecution to demonstrate that the particular procedure at issue is justified.

In *People* v. *Harris* (1984) 36 Cal.3d 36 [201 Cal.Rptr. 782 [679 P.2d 433], we held that on the facts of that case, the exclusive use of the voter registration lists as a basis for selecting jurors deprived the defendant of his right to a representative jury. The reason, we explained, is "that there is a large and increasing proportion of the general population that fails to register to vote, and that the proportion of minorities failing to register is larger than that for the general population." (P. 52.) If a minority group fails to register in proportion to its numbers, the county's decision to use the voter registration list as the exclusive source of jurors is a decision that this group will be underrepresented on its juries. Indeed, the Legislature has now recognized that voter registration lists do not yield representative juries, and has mandated counties to supplement those lists in the selection of jury venires.[2/] (See Code Civ.

2. At the time of defendant's trial, the master jury list in Kern County was compiled through the random selection of names from the county's voter registration list alone. Questionnaires were then sent to those

Proc., § 197.)

The Sixth Amendment to the United States Constitution and article I, section 16 of the California Constitution guarantee a criminal defendant the right to a trial by an impartial jury drawn from a representative cross-section of the community. (*Taylor* v. *Louisiana* (1975) 419 U.S. 522, 530 [42 L.Ed.2d 690, 698, 95 S.Ct. 692]; *People* v. *Wheeler* (1978) 22 Cal.3d 258, 272 [148 Cal.Rptr. 890, 583 P.2d 748].) This guaranty means that "a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." (22 Cal.3d at p. 277.)

In *Duren* v. *Missouri* (1979) 439 U.S. 357 [58 L.Ed.2d 579, 99 S.Ct. 664], the United States Supreme Court described a defendant's burden in asserting a fair cross-section challenge to a jury venire. The court held that in order to establish a prima facie violation of the fair cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number such persons in the community; and, (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. (P. 364 [58 L.Ed.2d at p. 579]; accord *People* v. *Harris, supra*, 36 Cal.3d 36, 50.)

Defendant in this case based his motion to quash on the testimony presented in three other jury challenges in Kern County Superior Court. (See *People* v. *Cantu*, Nos. 21891, 22229; *People* v. *Robinson*, No. 21518; *People* v. *Streeter*, Nos.22346, 22056, 21910, 21368.) By stipulation, the evidence in these cases was incorporated into the record, and defendant's motion was submitted on those transcripts.

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chosen to determine eligibility to serve as jurors. Although there were plans to use the names of those holding driver's licenses to assemble the master jury list in the future, such plans had not yet been implemented at the time of defendant's trial.

The majority concede that defendant's showing establishes that "the first prong of the Duren test is clearly satisfied." (See maj. opn., *ante*, p. 491.) Defendant has also satisfied the second and third prongs of the *Duren* test. With regard to the second prong — that the number of members of the cognizable group in the jury pool is not fair and reasonable in relation to the number of its members in the relevant community — defendant showed a "significant disparity based on the use of total population figures."[3] (See *Harris, supra*, 36 Cal.3d at p. 54.) Under the calculation in *People* v. *Cantu* that Hispanics represented 17.76 percent of the county's adult population (21.95 percent of total population) and 8.3 percent of the jury pool, there is an absolute disparity of 9.46 percent and a comparative disparity of minus 114 percent (or approximately 53 percent).

But while under *Harris* the showing based on total population figures is sufficient, defendant here went further and showed that the use of voter registration lists underrepresents the proportion of Hispanics eligible for jury service. The evidence presented in *Cantu* and *Robinson*, and incorporated into this case, showed that Hispanics comprised 16.3 percent of the jury eligible population (as compared to 17.76 percent of the total population),but still only 8.3 percent of the registered voters. Using those figures, there is an absolute disparity of 8 percent and a probability of less than one in one million that the disparity could have occurred by chance.[4]

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3. Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) 65 Cal.L.Rev. 776, 788-792.

4. The trial court itself recognized a prima facie showing of underrepresentation of Hispanic persons on Kern County jury panels when, in denying defendant's motion to quash, it stated "I do believe that there has been a prima facie showing that there is a disproportionate number of people with Hispanic surnames called for jurors, but I am not sure that means a thing, and as everybody knows by reading the Los Angeles Times and any other publication that there are an enormous number of people in this country illegally or green card-wise [*sic*] who are not really citizens. So, I

Finally, defendant has also satisfied prong three of the Duren test, i.e., that the alleged underrepresentation must be due to systematic exclusion of a cognizable group in the jury selection process. (*Duren* v. *Missouri, supra*, 439 U.S. at p. 364 [58 L.Ed.2d at p. 587].) It is here that the majority rests its holding, concluding that defendant failed to make the requisite showing of systematic underrepresentation. The majority err. In my opinion, systematic underrepresentation means only that the disparity is inherent in the particular jury selection process utilized, and not the result of random variations in that system. (*Bell, supra*, 49 Cal.3d at p. 565 (dis. opn. of Broussard, J., citing *Duren* v. *Missouri, supra*, 439 U.S. at p. 367 [58 L.Ed.2d at pp. 588-589].) But even under the majority view in Bell a defendant satisfies this prong by showing a specific element of the selection system which causes that system to underrepresent a cognizable group. Defendant has done so here. Indeed the prosecutor here conceded that if there is underrepresentation of eligible Hispanics on the jury panel — and the evidence makes it clear that there is — "the only explanation must lie in the fact

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don't think that really in and of itself means anything." The court's ruling was erroneous both in disregarding the proof of underrepresentation on the basis of allegedly common knowledge about the number of noncitizens in the county and in its finding that there was no showing of systematic exclusion.

First, as we held in *Harris, supra,* 36 Cal.3d 36, a defendant may rely upon total population figures, rather than pinpoint the exact number of people eligible for jury service, to make his prima facie case. The trial court here, like the court in *Harris* (p. 48), erroneously rejected defendant's showing on the grounds that his percentage of Hispanics may have included a large number of people who were not eligible for jury service, and in so doing improperly relieved the state of its burden to refute or justify the underrepresentation.

Second, the trial court ignored the evidence which defendant presented relating to the jury eligible population. Rather the court casually referred to the common knowledge, as reported in the newspaper, that there is "an enormous number" of noncitizens in the United States without recognizing that the evidence that had been presented did take account of that factor.

that this group is underrepresented among registered voters."

The majority reply that the county's system is racially neutral (maj. opn., *ante*, p. 496.) In fact, everyone — this court, the state Legislature, and the county itself — has by now recognized that a jury selection system which relies exclusively on voter registration lists is not racially neutral, and has to be changed.[5/] But the change to a multiple list system took time. The county chose to try defendant under the defective former system, even though that system resulted in racially unrepresentative juries, because it would have cost between $15,000 and $40,000 (less than the cost of this appeal) to put a multiple list system into effect earlier.

As we have explained (see, e.g., *People* v. *Harris, supra*, 36 Cal.3d at p. 58), to make a showing of violation of the fair cross-section requirement, defendant need not show that the jury commissioner intended to discriminate against Hispanics. All that need be shown is that the system of selection results in denial of a jury pool representing a fair cross-section of the community. The constitutionally mandated goal is a representative jury, not an unbiased commissioner or a facially neutral selection method. The decisions requiring the accused to show systematic, purposeful discrimination do not nullify others which condemn discrimination stemming from negligence or inertia. The latter recognize that official compilers of jury lists may drift into discrimination by not taking action to prevent it. In formulating a panel for a jury,

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5. The majority quote *United States* v. *Cecil* (4th Cir. 1988) 836 F.2d 1431, which said that "[I]t is sufficient that the system adopted provides a fair cross-section and we find both common sense and precedent establish that *if* the voter registration lists do this they are not tainted by some affirmative form of discrimination." (Pp. 1448-1449, italics added.) Clearly this and other cases cited by the majority are not authority that voter registrations lists may be used as an exclusive source for jury selection *fi* they do *not* provide a fair cross-section. We cannot expect perfection, as *Cecil* says (*ibid.*), but surely we can do better than the 53 percent comparative disparity shown here.

officials must adhere to a standard more stringent than mere abstention from intentional discrimination; they have an affirmative duty to develop and pursue procedures aimed at achieving a fair cross-section of the community. (*Avery* v. *Georgia* (1953) 345 U.S. 559, 561 [97 L.Ed. 1244, 1247, 73 S.Ct. 891]; *Akins* v. *Texas* (1945) 325 U.S. 398, 403 [89 L.Ed. 1692, 1696, 65 S.Ct. 1276].)

Evidence of a regular and notable disparity led the United States Supreme Court in *Duren, supra*, 439 U.S. 357, and this court in *Harris, supra*, 36 Cal.3d 36, to conclude that the cause of the underrepresentation was inherent in the jury selection process. Here defendant showed more than notable disparity. Here defendant demonstrated that the underrepresentation of Hispanics is due to the selection of jurors solely from voter registration lists. I would hold that defendant has adequately met the third prong of the *Duren* test, showing systematic exclusion of Hispanics in the jury selection process.

The right to be vindicated here is the right to a trial by a jury drawn from a fair cross-section of the community. It goes to the very heart of the integrity of the fact-finding process — the impartiality of the jury. As we recognized in *People* v. *Wheeler, supra*, 22 Cal.3d 258, 276, "[T]he primary purpose of the representative cross-section requirement ... is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences." When, as here, Hispanics are underrepresented on jury venires, just as when, in *Wheeler*, Blacks were peremptorily struck, "such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority." (*Ibid.*)

Nowhere is a representative jury more critical than in a capital case. In such cases the jury not only resolves the question of guilt or innocence but also serves as the conscience of the community in its most compelling role: it decides whether a person shall live or die. In this life or death determination the interplay of diverse values and views is

imperative if a fair and impartial judgment is to be rendered. A just decision in a capital case requires that people of all the different ethnic, racial and religious groups in our society have an equal chance at being selected as jurors. Defendant was denied that right in this case.

II.

In addition to its error in rejecting defendant's prima facie showing of unconstitutionally unrepresentative jury, the trial court also erred in excluding one juror on the basis of his generalized opposition to the death penalty.

As required by *Hovey* v. *Superior Court* (1980) 28 Cal.3d 1 [168 Cal.Rptr. 128, 616 P.2d 1301], jurors were questioned separately to determine their views on the death penalty. The voir dire to determine whether Juror Giangregorio was eligible to sit on a capital jury was extremely brief:

"Q:How do you feel about the death penalty?

"A: I am against it, your Honor.

"Q: Are you against in it every case?

"A: Every instance. I do not believe in it." Over defense objection and without further questioning, the court then granted the prosecutor's motion to exclude the juror for cause.

Under *Wainwright* v. *Witt, supra*, 469 U.S. 412, a juror may be excluded because of his views on capital punishment only if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (P. 424 [83 L.Ed.2d at pp. 851-852], quoting *Adams* v. *Texas* (1980) 448 U.S. 38, 45 [65 L.Ed.2d 581, 100 S.Ct. 2521].) The burden of showing that the juror should be excluded is on the party seeking exclusion. (*Witt, supra*, at p. 423 [83 L.Ed.2d at p. 851].) Deference is due to the trial judge who sees and hears the juror (p. 426 [83 L.Ed.2d at p. 853]); thus the issue on review is whether the judge's findings "are fairly supported by the record." (P. 434 [83 L.Ed.2d at p. 858]; see *Darden* v. *Wainwright* (1986) 477 U.S. 168, 176 [91

L.Ed.2d 144, 154, 106 S.Ct. 2464].)

The brief, unsearching colloquy with Juror Giangregorio is wholly insufficient to show that "[his] views would prevent or substantially impair the performance of his duties in accord with his instructions and his oath." (*Wainwright* v. *Witt, supra*, 469 U.S. 412.) Instead, it appears that the trial court simply excluded the juror based on the juror's opposition in principle to the death penalty. *Witherspoon* v. *Illinois, supra*, 391 U.S. 510, expressly held that political, religious, or philosophical opposition to capital punishment is insufficient to disqualify a juror. While *Wainwright* v. *Witt, supra*, 469 U.S. 412, repudiated as dictum the rigid test set out in footnote 21 of *Witherspoon*, it expressly reaffirmed Witherspoon's holding that the exclusion of a juror on the bias of a generalized opposition to capital punishment was unconstitutional.

Witherspoon v. *Illinois, supra*, 391 U.S. 510, involved a statute which provided that in capital cases "it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or *that he is opposed to the same*." (P. 512 [20 L.Ed.2d at p. 779], italics added.) Acting pursuant to that statute, the trial court excused six jurors who "said that they did not 'believe in the death penalty' ... without any attempt to determine whether they could nonetheless return a verdict of death." (P. 514 [20 L.Ed.2d at pp. 780-781].) The United States Supreme Court found the exclusion of these jurors from the penalty jury unconstitutional, declaring that "[One] who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror .... [W]hen [the State] swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." (Pp. 519-521 [20 L.Ed.2d at pp. 783-784].) "[W]e hold that a

sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Pp. 522-523 [20 L.Ed.2d at pp. 784-785], fn. omitted.)

In footnote 21 of *Witherspoon* v. *Illinois (supra*, 391 U.S. 510), the court proposed a specific test: jurors could be excluded only if they "made unmistakably clear ... that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (P. 522, fn. 21 [20 L.Ed.2d at p. 785].) This language became the "*Witherspoon* test" as applied in the courts of this and other states. (See, e.g., *People* v. *Velasquez* (1980) 26 Cal. 3d 425 [162 Cal.Rptr. 306, 606 P.2d 341].)

In *Wainwright* v. *Witt, supra*, 469 U.S. 412, the court rejected the *Witherspoon* test in favor of the one originally set out in *Adams* v. *Texas, supra*, 448 U.S. at page 45 [65 L.Ed.2d at pages 589-590]. It acknowledged, however, that its standard "leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." (*Witt, supra*, 469 U.S. at p. 421 [83 L.Ed.2d at p. 850].) This language makes it clear that even after *Witt*, opposition to capital punishment by itself is still insufficient to justify removal of a juror. Thus, *Witt* reaffirmed that *Witherspoon* was correctly decided on the facts of that case.[6] Confirming this conclusion, *Witt* described *Witherspoon*

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6. Likewise, the court apparently agreed that two post-*Witherspoon* cases (*Maxwell* v. *Bishop* (1970) 398 U.S. 262 [26 L.Ed.2d 221, 90 S.Ct. 1578] and *Boulden* v. *Holman* (1969) 394 U.S. 478 [22 L.Ed.2d 433, 89

as representing a necessary balance between a defendant's right to a jury drawn from a fair cross-section of the community and the prosecutor's right to remove a biased juror, and stated "[W]e adhere to the essential balance struck by the Witherspoon decision in 1968 ...; we simply modify the test stated in *Witherspoon*'s footnote 21 to hold that the State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of the duties in accordance with their instructions or their oaths." (P. 424, fn. 5 [83 L.Ed.2d at p. 852].)

The California cases following *Wainwright* v. *Witt, supra,* 469 U.S. 412, illustrate the circumstances under which a juror can be excluded because of his views on capital punishment. In *People* v. *Miranda* (1987) 44 Cal.3d 57, 95 [241 Cal.Rptr. 594, 744 P.2d 1127], the juror asserted that she would "'never vote for a verdict of death.'" In *People* v. *Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467, 755 P.2d 917], one juror said his mind was a "closed book," and that he was not sure he could conceive of a crime so heinous that he would vote for death. (P. 955.) Upon further questioning he affirmed that he would never vote for the death penalty. (*Ibid.*) Another juror said, "I guess conscientiously I would have to say that I would absolutely vote for the life without parole." Asked if she would ever so vote "automatically", she replied, "'I would have to say that I would.'" (P. 956.) In *People* v. *Howard* (1988) 44 Cal.3d 375, 418 [243 Cal.Rptr. 842, 749 P.2d 279], each excluded juror "unqualifiedly stated he or she would not vote to impose death." In *People* v. *Coleman* (1989) 48 Cal.3d 112, 137 [255 Cal.Rptr. 813, 768 P.2d 32], the juror, asked if she would automatically vote against first degree murder, replied, "'I'm afraid I would

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S.Ct. 1183]), both of which applied the *Witherspoon* formula in overturning death penalties, were correctly decided, since its decision distinguishes them in part on the ground that "both involved jurors who were excused merely because they had 'conscientious' objections to, or did not 'believe in,' the death penalty." (*Will, supra*, 469 U.S. at p. 422, fn. 4 [83 L.Ed.2d at p. 850].)

avoid the death penalty. I would vote so that I wouldn't have the death penalty on my mind.'" In *People* v. *Walker* (1988) 47 Cal.3d 605, 624 [253 Cal.Rptr. 863, 765 P.2d 70], the juror asserted that she would vote against the death penalty "'regardless of what the facts might be in this case.'"In *People* v. *Boyde* (1988) 46 Cal.3d 212 [250 Cal.Rptr. 83, 758 P.2d 25], a juror was asked whether he could under any circumstances return a death verdict; he responded, "I can't do it, sir." (P. 245.) Another juror said he would not impose the death penalty regardless of the severity of the aggravating evidence. (*Ibid.*) A third juror said the only case in which she might vote for death would be one involving the murder of her own child. (P. 246.) In sum, whenever we have upheld the exclusion of a juror, that juror has said something which indicates that he could not decide the case impartially on the evidence and relevant factors, but instead that his vote was predetermined by his views on the death penalty.

With these precedents in mind, it is instructive to look again at the voir dire of Juror Giangregorio. He was first asked, "How do you feel about the death penalty?" and replied, "I am against it, your Honor." This is the sort of generalized opposition to capital punishment which is clearly insufficient to disqualify a juror under *Witherspoon, supra*, 391 U.S. 510, *Wainwright* v. *Witt, supra*, 469 U.S. 412, or any California precedent. The judge then asked, "Are you against it in every case." The juror replied, "Every instance. I do not believe in it." This second answer adds nothing, because a person who is against the death penalty is, by definition, opposed to it in every instance. One who favors the death penalty in some cases but not in others is considered a supporter of the death penalty. The court asked Giangregorio only whether he was "against" the death penalty "in every instance," not whether he could apply the law if he concluded that under the law the death penalty was appropriate. The juror's answer, "I do not believe in it," is again just a general statement of belief, not an expression of whether his ability to apply the law would be impaired.

The majority opinion, however, asserts that "Giangregorio's expressed antipathy to the death penalty in 'every instance' ... would undoubtedly 'substantially impair the performance of his duties as a juror.'" (Maj. opn., *ante*, at p. 503.) This assertion is squarely inconsistent with the language in *Witherspoon* where the court declared that "[One] who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." (*Witherspoon* v. *Illinois, supra*, 391 U.S. 510, 519 [20 L.Ed.2d 776, 783].) As we have seen, this portion of *Witherspoon* was not overturned by *Wainwright* v. *Witt, supra*, 469 U.S. 412, and remains controlling law.

For the foregoing reasons, I would reverse the judgment and remand this case for a new trial.

Appellant's petition for a rehearing was denied November 28, 1990.

No. 04-980

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner*,

v.

RONALD L. SANDERS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court grant certiorari to review the determination that California is a "weighing state" and therefore bound by *Clemons v. Mississippi*, 494 U.S. 738 (1990), where petitioner did not dispute that determination in either the District Court or the Court of Appeals and where that determination is consistent with decisions of this Court and state law?

2. Should the Court grant certiorari to consider whether the determination that California is a "weighing state" under *Clemons v. Mississippi*, 494 U.S. 738 (1990), created a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), where petitioner never asserted a *Teague* defense in either the District Court or the Court of Appeals and where this Court already has held that *Clemons* claims are not barred by the *Teague* doctrine?

3. Should the Court grant certiorari to review the determination that the California Supreme Court failed to engage in adequate constitutional harmless error analysis as required by *Clemons v. Mississippi*, 494 U.S. 738 (1990), where petitioner never asserted its argument on the issue in either the District Court or the Court of Appeals and where the state court never purported to describe its review as a "harmless error" inquiry and instead relied upon this Court's holding in *Zant v. Stephens*, 462 U.S. 862 (1983)?

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STATEMENT OF THE CASE

In 1993, respondent Ronald L. Sanders (hereafter "Sanders") filed a pre-AEDPA habeas petition in the United States District Court for the Eastern District of California challenging his state conviction for murder and other crimes and his sentence of death. The proceedings began in 1981, when the State of California charged Sanders and a codefendant with the attempted murder of a drug dealer, Dale Boender, and the murder of Boender's girlfriend, Janice Allen, during a robbery and burglary. Sanders also was charged with attempted robbery of the same couple a few days before the murder.

The first trial of Sanders and his codefendant resulted in a mistrial when the jury could not reach a unanimous verdict as to the defendants' guilt. App. A at 8894. There was good reason for the jury's inability to convict. Contrary to the statement of the case presented by petitioner, Warden Jill L. Brown (hereafter "the State"), there was no finding that Sanders actually killed Allen or attempted to kill Boender. Before he was attacked, Boender heard one of the assailants say he wanted to leave Boender's apartment and the other say he wanted to stay. App. A at 8893-94. Boender was unable to identify who wanted to stay and who wanted to leave. App. A at 8894. At trial, the prosecutor conceded that there was no direct evidence that Sanders was the actual killer and acknowledged that Sanders might not have been the killer. RT 1526. On direct appeal, the California Attorney General agreed "that it is unclear who personally killed Ms. Allen." *People v. Sanders*, No. 22512, Respondent's Brief at 101. Indeed, the uncertainty about Sanders's personal culpability for the crimes was an important factor in the Circuit Court's assessment of this case. App. A at 9008, 9010-11.

At a retrial in 1982, Sanders and his codefendant ultimately were convicted of all charges. The jury found both defendants eligible for the death penalty by finding four special circumstances

true: the burglary-murder special circumstance, the robbery-murder special circumstance, the witness-murder special circumstance, and the especially-heinous-atrocious-and-cruel-murder special circumstance. After being instructed to weigh the aggravating factors, including the four special circumstances found to be true, against the mitigating factors, the jury returned a death sentence against Sanders. The prosecutor waived his request for a death sentence against the codefendant, who was sentenced to life in prison without the possibility of parole.

In 1990, the California Supreme Court affirmed Sanders's conviction and death sentence. *People v. Sanders*, 51 Cal.3d 471, 797 P.2d 561 (1990); App. C. The state court invalidated two of the four special circumstances the jury found true – the burglary-murder special circumstance and especially-heinous-atrocious-and-cruel-murder special circumstance. Nevertheless, the court rejected Sanders's claim that his death sentence must be set aside. Without acknowledging this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and instead relying on *Zant v. Stephens*, 462 U.S. 862 (1983), the California Supreme Court held that consideration of the invalid heinous-murder special circumstance and invalid burglary-murder special circumstance in deciding to impose the death penalty was "benign" and added that there was "little chance" that Sanders was prejudiced by consideration of the invalid burglary-murder special circumstance. App. C at 68-69. On May 28, 1991, the judgment became final when this Court denied certiorari on direct appeal. *Sanders v. California*, 500 U.S. 948 (1991).

Throughout this litigation, Sanders argued that California is a "weighing state" as that term is used in *Clemons v. Mississippi*, 494 U.S. 738. *Sanders v. Woodford*, United States District Court, CV-F-92-5471-REC-P, Memorandum of Point and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus at 385-86. Accordingly, Sanders argued that once the state supreme court had invalidated two of the four special circumstances

considered by the jury in deciding that he should be executed, the state supreme court was obligated to perform a harmless error analysis in accord with *Clemons*. *Id.*

The State did not dispute that California is a weighing state. *Sanders v. Woodford*, CV F-92-5471 REC-P, Answer to Second Amended Petition for Writ of Habeas Corpus at 226-27. Instead, the State's only argument was that the state supreme court had complied with *Clemons* and had applied constitutional harmless error analysis. *Id.* The State did not assert that relief on this claim would be barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 228. *Id.* On August 24, 2001, the District Court denied Sanders's petition for writ of habeas corpus. App. 8996.

On appeal, Sanders again argued that (1) California is a "weighing state" as that term is used in *Clemons* and (2) therefore the state supreme court (having voided two of the four special circumstance allegations in the case) was obligated to perform a harmless error analysis in accord with *Clemons*. *Sanders v. Woodford*, No. 01-99017, Appellant's Opening Brief at 67-72. Once again, the state did not dispute that California is a weighing state. *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 42-49. Once again, the State's only argument was that the state supreme court had complied with *Clemons* and had applied constitutional harmless error analysis. *Id.* Once again, the state did not assert that relief on this claim would be foreclosed by *Teague v. Lane*, 489 U.S. 228.

On July 8, 2004, the Court of Appeals (Judges Fisher, Kleinfeld, and D. Nelson) unanimously reversed the death judgment and conditionally granted the writ as to the penalty phase. Rejecting the argument that the State *had* made, the panel unanimously held that after invalidating the two special circumstances, the California Supreme Court did not remand for resentencing and did not conduct an independent reweighing or a proper harmless-error review as

required by *Clemons*. App. A at 9017. The three-judge panel held that (1) California is a weighing state (App. A at 8999-9003); (2) after invalidating two of the special circumstances considered by the jury in deciding to impose the death penalty, the state court conducted inadequate harmless-error review which deprived Sanders of the individualized death sentence to which he was entitled under the Eighth Amendment (App. A at 9003-06); and (3) the state court's inadequate harmless-error analysis had a substantial and injurious effect on the jury's penalty verdict (App. A at 9006-11). Although the State seeks review on certiorari of the first two rulings, it does not challenge the Circuit Court's conclusion that the Eighth Amendment error was prejudicial.

The State sought rehearing en banc. For the first time in years of litigating this case, the State now argued that California is not really a weighing state at all. *Sanders v. Woodford*, No. 01-99017, Respondent's Petition for Rehearing en Banc at 1, 3-16. On October 13, 2004, the three-judge panel of the Court of Appeals unanimously denied the State's petition for rehearing en banc, reporting that "[t]he full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to hear the matter en banc. Fed. R.App.P. 35."

On January 11, 2005, the State served its Petition for Writ of Certiorari, and Sanders's response is due by February 23, 2005.

ARGUMENT

I. THIS COURT SHOULD DENY REVIEW OF THE STATE'S ARGUMENT THAT CALIFORNIA IS NOT A WEIGHING STATE BECAUSE THAT ARGUMENT NEVER WAS PROPERLY RAISED BELOW AND THE CIRCUIT COURT'S DETERMINATION IS CLEARLY CORRECT.

The State's failure to dispute that California is a weighing state in the lower courts is reason enough to deny review on certiorari. In addition, the question of whether California is a weighing state for purposes of *Clemons v. Mississippi*, 494 U.S. 738, does not meet the criteria for review set forth in Supreme Court Rule 10. The Circuit Court decision that California is a weighing state resulted from a straightforward application of this Court's well-established law on the difference between weighing and nonweighing death penalty statutes and is fully consistent with both the plain language of California Penal Code section 190.3 and the California Supreme Court's view of the California death penalty statute.

A. This Court Should Not Review on Certiorari an Argument Belatedly Raised by the State for the First Time in a Petition for Rehearing En Banc.

Throughout the litigation of Sanders's *Clemons* claim in federal court, the State never has disputed that California is a weighing state. As noted above, in both the District Court and the Court of Appeals, the State's only argument was that there was no *Clemons* error because the state court's harmless error review was constitutionally sufficient under *Clemons*. *Sanders v. Woodford*, CV F-9205471 REC-P, Answer to Second Amended Petition for Writ of Habeas Corpus at 226-27; *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 42-49.

As also noted above, when the State lost on appeal, it seized on an entirely new argument in its petition for rehearing en banc. Now the State attacked the conclusion that California is a weighing state as a "false premise," even though the State had acceded to this premise for years. *Sanders v. Woodford*, No. 01-99017, Respondent's Petition for Rehearing at 1, 3-16. Under the

view of the state scheme advocated by the State for the first time in its rehearing petition, California may seem "at first blush" to be a weighing state, but it is not "a true weighing state." *Id.* at 5. Rather, in the State's new view, California's death penalty is a "hybrid" statute, *id.* at 3, 12, 13, to which neither the weighing category, as defined in *Clemons v. Mississippi*, 494 U.S. 738, nor the nonweighing category, as defined in *Zant v. Stephens*, 462 U.S. 862 (1983), applies. *Id.* at 13.

The State did not attempt to present any reasons, let alone exceptional circumstances, for the Court of Appeals to review arguments raised for first time in its petition for rehearing en banc. *See, e.g.*, *Picazo v. Alameida* 366 F.3d 971, 972 (9th Cir. 2004) (finding that the State waived the argument, raised for first time in the petition for rehearing, that a new standard of review applied in habeas cases involving state court harmless error findings); *United States v. Patzer*, 284 F.3d 1043, 1046 (9th Cir. 2002) (holding that "completely new theory" of probable cause raised in the petition for rehearing was waived where "there is no reason it could not have been argued in the Government's original response brief."); *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986) (declining to address government's argument, raised for first time in a petition for rehearing, that defendant waived severance). In light of the patently inadequate way in which the State presented the issue to the Circuit Court, it is hardly surprising that not only was the panel's decision to deny rehearing en banc unanimous, but that "no judge of the [full] court . . . requested a vote on whether to rehear the matter en banc." App. B.

In its Petition for Writ of Certiorari, the State changes course yet again and now argues that California's statute creates a nonweighing death penalty scheme. Petition at 4-10. Although this Court has the power to review a question that was decided in the Court of Appeals, even when the petitioner did not present the issue, *United States v. Williams*, 504 U.S. 36, 41 (1992),

it should decline to grant review of the State's belatedly-raised and newly-revised position about whether California is a weighing state. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 333-334 (2002) (precluding a party from disputing a premise that it had failed to challenge in the lower courts). The "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition." *Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985). Having assumed that California is a weighing state in both the District Court and the Court of Appeals, the State's "bait and switch" strategy unjustifiably asks this Court to entertain arguments that could have been presented, fully explored, and resolved by the Circuit Court. This Court should decline to review Question 1.

B. The Determination of the Circuit Court that California is a Weighing State is Consistent with the Decisions of this Court and California's Own View of its Death Penalty Statute.

For over two decades, this Court has taken a common-sense approach to determining whether death penalty statutes create "weighing" or "nonweighing" states. The crucial distinction lies in the role of aggravating circumstances. In a nonweighing state, an aggravating circumstance functions only to narrow "the class of persons convicted of murder who are eligible for the death penalty," but it "does not play any role in guiding the sentencing body in the exercise of its discretion" to impose a death sentence on a death-eligible defendant. *Zant v. Stephens,* 462 U.S. at 874; *Stringer v. Black,* 503 U.S. 222, 231-32 (1992). In contrast, in a weighing state "the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances." *Clemons v. Mississippi,* 494 U.S. at 745; *Zant v. Stephens,* 462 U.S. at 873 n.12. The Court has routinely found that states that require the jury to weigh aggravating and mitigating factors in deciding

whether or not to impose the death penalty are "weighing states." *Parker v. Dugger,* 498 U.S. 308, 318 (1991) (Florida); *Stringer v. Black,* 503 U.S. at 229 (Mississippi); *Richmond v. Lewis,* 506 U.S. 40, 46 (1992) (Arizona).

California's 1978 death penalty law fits squarely within this straightforward definition. California Penal Code section 190.3 sets forth the aggravating and mitigating factors which a jury may consider in choosing between life and death. It then explicitly requires the jury to select a sentence by weighing the aggravating factors against the mitigating factors:

> [T]he trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in the state prison for a term of life without the possibility of parole.

Cal. Pen. Code § 190.3. The jury instruction given to Sanders's jury tracked this statutory provision verbatim. App. C at 69, 85. California's unequivocal provision that the weighing of aggravating and mitigating factors is a prerequisite to imposing a death sentence establishes that California is a weighing state.

This Court repeatedly has noted that the California statute directs juries to weigh aggravating and mitigating circumstances in determining the penalty in a capital case. *Boyde v. California,* 494 U.S. 370, 374, 377 (1990); *California v. Brown,* 479 U.S. 538, 540 (1983); *California v. Ramos,* 463 U.S. 992, 995, n.3 (1983). In addition, 14 years ago, two members of the Court noted specifically that California is a weighing state. Dissenting from denial of certiorari in *Pensinger v. California,* 502 U.S. 930 (1991), Justice O'Connor, joined by Justice Kennedy, accurately observed that California, like Mississippi, "requires its juries to weigh aggravating and mitigating circumstances" *id.* at 931, and that the California Supreme Court's

harmless error analysis after invalidating one of two special circumstances was incompatible with *Clemons*. *Id.* at 931-32.

The California Supreme Court also has consistently described the penalty selection decision under California's 1978 law as a "weighing" process in which the jury weighs the listed aggravating and mitigating factors against each other and is authorized to return a death sentence *only* if the jurors determine that the aggravation outweighs the mitigation. *See, e.g., People v. Marks*, 31 Cal.4th 197, 233, 72 P.3d 1222, 1246 (2004), *cert. denied,* 124 S.Ct. 2101 (2004); *People v. Arias,* 13 Cal.4th 92, 171, 913 P.2d 980, 1030 (1996), *cert. denied*, 520 U.S. 1251 (1997); *People v. Duncan,* 53 Cal.3d 955, 978, 810 P.2d 131, 144 (1991), *cert. denied*, 503 U.S. 908 (1992); *People v. Hendricks*, 44 Cal.3d 635, 654-55, 749 P.2d 836, 846-47 (1988), *cert. denied*, 488 U.S. 900 (1988); *People v. Brown,* 40 Cal.3d 512, 544, 726 P.2d 516, 532-34 (1985), *rev'd on other grounds, California v. Brown*, 479 U.S. 538 (1987).[1]

But the California Supreme Court has gone even further. The state court itself has ruled that *Clemons* harmless error review applies in California. In *People v. Holt*, 15 Cal.4th 619, 693, 937 P.2d 213, 261 (1997), *cert. denied*, 522 U.S. 1017 (1997), the California Supreme Court rejected the defendant's claim that the reversal of a special circumstance or a felony conviction, which are considered as aggravating factors at the penalty phase, automatically requires reversal

[1] Even the California Attorney General has underscored the centrality of California's weighing process. In its brief in this Court in *Boyde v. California*, 494 U.S. 370, the State described the "weighing of aggravating and mitigating circumstances" as "the heart of the California procedure." Respondent's Brief on the Merits at 40 n.12; *see also id.* at 72-75 (extolling the virtues of California's weighing requirement). The Attorney General's claim here that California is a nonweighing state simply cannot be squared with the emphasis he placed on California's weighing procedure in *Boyde*.

of the death penalty. Its explanation was simple:

> Harmless error standards may be applied to penalty phase error. (*Sochor v. Florida* (1992) 504 U.S. 527, 532; *Stringer v. Black* (1992) 503 U.S. 222, 230; *Clemons v. Mississippi* (1990) 494 U.S. 738.)

Id. at 261 (parallel citations omitted). The citation to *Clemons* and its progeny makes sense only if the state court views California's death penalty to be a weighing scheme. As this Court noted in *Stringer*, "[i]t would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. at 235.[2]

[2] The State argues that the California Supreme Court's citation of *Zant v. Stephens,* 462 U.S. 862, in the direct appeal opinion in this case was the state court's shorthand way of declaring California has a nonweighing scheme. Petition at 9; *see*, App. A at 9003-04. Of course, this entirely ignores the state court's subsequent and specific citation of the *Clemons* harmless error rule. *People v. Holt*, 15 Cal.4th at 693. Moreover, the State's imaginative theory inflates the citation to *Zant* in this case with far more meaning than it can hold.

When this case was decided, the California Supreme Court had not yet acknowledged that this Court had articulated different rules for assessing the effect of invalid aggravating circumstances in weighing and nonweighing states. Rather, the state court uniformly had relied on *Zant v. Stephens*, 462 U.S. 862 (1983), in reviewing claims that the jury was improperly influenced by the presence of invalid special circumstances. Thus, it is not surprising that the state court in this case cited *Zant* for the proposition that "[t]he United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors." App. C at 67. Especially in light of *Holt*, the citation to *Zant* is wholly insufficient to serve as a "shorthand signal" for a holding that California is a nonweighing state – a proposition that the California Supreme Court, to this day, never has endorsed. *Sochor v. Florida,* 504 U.S. 527, 540 (1992).

In addition, the State's reading of the citation to *Zant* in its Petition for Writ of Certiorari is starkly inconsistent with its prior understanding of that citation. In the Court of Appeals, the State minimized the citation to *Zant*, asserting that "[t]he California court's reliance on *Zant* was proper since it cited *Zant* only for the proposition that a conviction can be upheld even when there is an invalid factor in aggravation." *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 44. The State argued that there was no error because the state court did not automatically affirm the death sentence. *Id.* at 45. Of course, if the citation to *Zant* means what the State now contends, *i.e.*, that California is a nonweighing state, then an automatic affirmance would have been permissible. The State's contradictory arguments about the *Zant* citation underscore the weakness of its basic position and its failure to present to the courts below the theories on which it now relies. Both are reasons to deny certiorari.

In urging a contrary result, the State attempts to extract from *People v. Bacigalupo*, 6 Cal.4th 457, 862 P.2d 808 (1993), *cert. denied*, 512 U.S. 1253 (1994), a ruling that "while the state scheme required juries to 'weigh' aggravation and mitigation to reach a penalty determination, California is not a weighing state . . . ." Petition at 9. The State offers no analysis or explanation of its novel reading of the case. The actual holding in *Bacigalupo* is that the statutory sentencing selection factors in California Penal Code section 190.3 are not subject to the Eighth Amendment vagueness standard set forth in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*, 486 U.S. 356 (1988). *Bacigalupo*, 6 Cal.4th at 476-77, 862 P.2d at 819. The California Supreme Court in *Bacigalupo* did not address the constitutional remedy when the state court invalidates special circumstances that the jury considered as aggravating factors under section 190.3 in determining the penalty. Notably, nowhere in the opinion does the California Supreme Court purport to conclude that California is a nonweighing state.

The State also asserts that allegedly unique features of California's law create a nonweighing statute. Petition at 4-7. However, the California statute is indistinguishable in any meaningful way from that of Mississippi, which this Court has held to be a weighing state. *Clemons v. Mississippi*, 494 U.S. at 745; *Stringer v. Black*, 503 U.S. at 229. The Mississippi capital-sentencing scheme shares most of the features that the State claims render California's law nonweighing. In both states, death eligibility is determined at the guilt phase, and the defendant enters the penalty with at least one aggravating factor already found against him. Cal. Pen. Code §§ 190.2 and 190.3, factor (a); Miss. Code Ann. §§ 97-3-19(2) and 99-19-101(5); *Brown v. State*, 682 So.2d 340, 354-55 (Miss. 1996), *cert. denied*, 520 U.S. 1127 (1997); *Hill v. State*, 432 So.2d 427, 458 (Miss. 1983), *cert. denied*, 464 U.S. 977 (1983); *see also Williams v. State*, 684 So.2d 1179, 1190-91 (Miss. 1996), *cert. denied*, 520 U.S. 1145 (1997). And in both states, at

the penalty phase the prosecutor can attempt to prove additional aggravating factors (beyond the death-eligibility circumstances) only from a discrete statutory list. *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782, 790 (Cal. 1985); *People v. Coffman*, 34 Cal.4th 1, 109, 96 P.3d 30, 112 (2004); Miss. Code Ann. § 99-19-101(5).

Perhaps most important, the rules governing the weighing procedure are almost identical in California and Mississippi. The weighing of aggravation and mitigation is not a mechanical process. *People v. Brown*, 40 Cal.3d at 544 n.17, 726 P.2d at 534 n.17; *see Boyde v. California*, 494 U.S. at 374 n.3; *Wilcher v. State*, 635 So.2d 789, 792-93 (Miss. 1993), *cert. denied*, 469 U.S. 873 (1984). Even if juries find that the aggravation outweighs the mitigation, they still must decide that the death penalty is the appropriate punishment. *People v. Brown*, 40 Cal.3d at 541, 726 P.2d at 532; Miss. Code Ann. § 99-19-101(2)(d); *Gray v. Lucas*, 677 F.2d 1086, 1106 (5th Cir. 1982), *cert. denied*, 461 U.S. 910 (1983); *Brown v. State*, 682 So.2d at 354. Moreover, juries can reject a death sentence in favor of a life verdict even if they find that there are no mitigating circumstances. *People v. Duncan*, 53 Cal.3d at 979, 810 P.2d at 144; *Tokman v. State*, 435 So.2d 664, 670 (Miss. 1983), *overruled on other grounds*, *Willie v. State*, 585 So.2d 660, 681 (Miss. 1991); *Clemons v. State*, 535 So.2d 1354, 1361 (Miss. 1988), *rev'd on other grounds*, *Clemons v. Mississippi*, 494 U.S. 738 (1990). In short, California, no less than Mississippi, is a weighing state.[3]

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[3] Contrary to the State's contention, the use of a unitary list of sentencing factors, rather than lists of separately labeled aggravating and mitigating circumstances, does not subvert the weighing character of the statute. The California Supreme Court has been clear that *only* factors (a), (b), (c) and (i) can be considered as aggravating factors and the remaining factors can be considered only as mitigating. *People v. Morrison*, 34 Cal.4th 698, 728, 101 P.3d 568, 589 (2004); *People v. Hamilton*, 48 Cal.3d 1142, 1184, 774 P.2d 730, 755 (1989), *cert. denied*, 494 U.S. 1039 (1990), and that there is no need for instructions to designate which factors are aggravating and which are mitigating because jurors readily can identify them as such on their own. *People v. Benson*, 52 (continued...)

In the final analysis, this is a simple issue. The jury was told it should decide if Sanders would live or die by weighing aggravating factors against the mitigating factors. That makes California a weighing state. This Court should deny certiorari as to Question 1.

II. THE COURT SHOULD DENY REVIEW OF THE STATE'S TARDY ASSERTION OF A *TEAGUE* BAR, WHICH IS INAPPLICABLE TO THE DETERMINATION THAT CALIFORNIA IS A WEIGHING STATE UNDER *CLEMONS v. MISSISSIPPI.*

This Court should deny review of the State's *Teague* claim because the issue never was presented to the courts below. The issue also has no merit. This Court already has held that *Clemons* did not result in a *Teague*-barred new rule, and this Court has applied the *Clemons* rule to other states without any mention of a *Teague* problem.

A. This Court Does Not Review a Question Presented by the Petitioner for the First Time in A Petition for Writ of Certiorari.

The State asks this Court to consider a claim under *Teague v. Lane*, 489 U.S. 228 (1989), that it failed to raise at any point before reaching this Court. As noted above, the State did not assert *Teague* in the District Court, although it raised procedural defenses to many other claims. *Sanders v. Woodford*, CV F-92-5471 REC-P, Answer with Points and Authorities to Second Amended Petition for Writ of Habeas Corpus at 7-10. Nor did the State assert *Teague* in the Court of Appeals, either in its opposition to Sanders's application for a Certificate of Appealability on his *Clemons* claim or in its briefing on the merits. *Sanders v. Woodford*, No. 01-99017, Opposition to Petitioner's Application for Certificate of Appealability at 35-37; *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 41-51. Indeed, the State has readily admitted, but has not justified, its failure to assert *Teague* below. Petition at 11 n.4. The State nowhere

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[3] (...continued)
Cal.3d 754, 802, 802 P.2d 330, 359 (1990), *cert. denied*, 502 U.S. 924 (1991).

suggests that its omission resulted from an inadvertent or negligent oversight.

The *Teague* bar is not jurisdictional, *Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990), and this Court need not entertain the defense if the State has not raised it. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). In other death penalty cases, the Court has refused to rule on *Teague* claims that were not raised in the lower courts. *See, e.g., Hopkins v. Reeves*, 524 U.S. 88, 93 n.3 (1998) ("Because the State raised this argument for the first time in its petition for writ of certiorari, we choose to decide the case on the merits"); *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993) (refusing to reach the issue "because petitioner did not raise a *Teague* defense in the lower courts or in his petition for writ of certiorari"); *Schiro v. Farley*, 510 U.S. at 228-29 (refusing to reach the issue because petitioner did not raise a *Teague* argument in the lower courts or in its opposition to certiorari). The Court should do the same here.

The State asks this Court for a second chance to defeat Sanders's *Clemons* claim. Having withheld its *Teague* defense from the lower courts in an attempt to win the issue on the merits, the State now, having lost, seeks to win by playing *Teague* as it procedural trump card. This Court rejected such a sandbagging strategy with regard to an exhaustion defense in a pre-AEDPA case, and its reasoning applies as well to the *Teague* defense in this pre-AEDPA case:

> We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event" – in this case, the proceeding in the District Court – is over. Although the record indicates that the State's failure to raise the nonexhaustion defense in this case was the result of inadvertence, rather than a matter of tactics, it seems unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use on appeal if necessary.

Granberry v. Greer, 481 U.S. 129, 132 (1987) (citations and footnote omitted). Moreover, "in this case, not only is the 'main event' completed, the rematch is finished as well," because the State did not even bother to raise the *Teague* bar in its petition for rehearing en banc. *Boardman*

v. Estelle, 957 F.2d 1523, 1537 (9th Cir. 1992) (applying *Granberry* to decline review of a *Teague* claim raised for the first time in a rehearing petition), *cert. denied*, 506 U.S. 904 (1992). The State's tactic not only seeks unfair advantage in litigating this claim but, as discussed with regard to Question 1, wastes the limited resources of the federal courts. *See ante* at page 7. The Court should not countenance such gamesmanship particularly in a capital case.[4]

B. The Determination that California is a Weighing State under *Clemons v. Mississippi* Did Not Create A New Rule under *Teague v. Lane*.

The State's tardy assertion of the nonretroactivity rule recycles its complaints about the Circuit Court's merits ruling. *See* Petition at 12. Its disagreement with the decision that California is a weighing state under *Clemons*, however, does not implicate *Teague*. *Teague*'s essential point is that a petitioner seeking habeas corpus relief in federal court cannot benefit from a new rule announced *after* his or her conviction became final. *Teague v. Lane*, 489 U.S. at 301; *Stringer v. Black*, 503 U.S. at 227. This threshold fact is missing here. *Clemons* was decided on March 28, 1990, *before* Sanders's conviction became final on May 28, 1991. The Circuit Court's decision was a straightforward application of existing precedent to California's death penalty statute. Thus, *Teague* does not apply to this case.

But even assuming a *Teague* analysis were appropriate, the nonretroactivity rule would not foreclose the relief granted by the court below. It is noteworthy that the State does not cite a single case to support its *Teague* claim, *see* Petition at 11-12, presumably because this Court already has held that *Clemons* did not create a new rule under *Teague*. *Stringer v. Black*, 503

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[4] The State notes another panel of the Court of Appeals in another case, *Beardslee v. Brown*, 393 F.3d 1032 (9th Cir. 2004), *cert. denied*, ___ U.S. ___, 2005 WL 92495 (January 18, 2005) recently decided the *Teague* issue raised in this Court. The ruling in *Beardslee*, however, does not excuse the State's waiver of the defense here. In *Beardslee*, the Circuit Court recognized that there was no *Teague* problem: "[i]f *Teague* precluded relief in this case, it necessarily would have precluded relief in *Sanders*, which it did not." *Id.* at 1040.

U.S. at 229-32 (no *Teague*-bar in a case where the conviction was final in 1985). *Stringer* found that *Clemons*'s application of an existing constitutional rule – the rule applied to Florida in *Barclay v. Florida*, 463 U.S. 939 (1983) – to a different state's capital-sentencing statute (Mississippi's) did not violate *Teague*. *Stringer v. Black*, 503 U.S. at 231-32.

After *Stringer*, this Court applied *Clemons* to Florida in *Parker v. Dugger*, 498 U.S. 308 (1991), and Arizona in *Richmond v. Lewis*, 506 U.S. 40 (1992), without finding that a new rule was created. There is no hint in *Parker* or *Richmond* that the differences between Mississippi's jury sentencing statute and Florida's split jury-judge sentencing procedure or Arizona's judge sentencing system would result in a *Teague*-barred rule. In *Richmond*, Justice Thomas, concurring, stated explicitly what the absence of any *Teague* discussion implies. He noted that the State did not claim that *Richmond* created a new rule under *Teague*, because "a *Teague* defense is foreclosed by *Stringer v. Black*, 503 U.S. 222 . . . , which held that 'there was no arguable basis' in February 1985 to support the view than an appellate court in a weighing State 'was permitted to apply a rule of automatic affirmance to any death sentence supported by multiple aggravating factors, when one is invalid.'" *Richmond*, 506 U.S. at 53-53 (parallel citations omitted). Indeed, as far as Sanders can determine, neither this Court nor any circuit since *Stringer* has that found a *Clemons* appellate-review claim to be *Teague* barred. *See Beardslee v. Brown*, 393 F.3d at 1040-41.

Finally, the State urges review of its *Teague* claim because it fears that the ruling in this case may affect at least 20 other California capital cases. Petition at 11 n.4. Its prediction is wholly unsupported. The impact of this case depends not, as the State seems to suggest, on whether the California Supreme Court has invalidated special circumstances in 20 other capital cases but (1) whether it failed to conduct adequate harmless error review in those cases and, if so,

(2) whether the jury's weighing of the invalid special circumstance was prejudicial. In the 15 years since *Clemons* was decided, there has been no deluge of *Clemons* claims flooding the federal courts in California. The Ninth Circuit has addressed only five such claims and has granted habeas relief under *Clemons* in only one case – this one. *See Allen v. Woodford*, __ F.3d __, 2005 WL 127041 at * 28-31 (9th Cir. 2005) (holding that the invalidation of a duplicative multiple-murder special circumstance was not prejudicial); *Beardslee v. Brown*, 393 F.3d at 1041-44 (holding that the jury's consideration of two invalid special circumstances, which resulted in *Clemons* error, was not prejudicial); *Morales v. Woodford*, 388 F.3d 1159, 1169-72 (9th Cir. 2004) (holding that the jury's consideration of an invalid torture special circumstance, which resulted in *Clemons* error, was not prejudicial); *Williams v. Calderon*, 52 F.3d 1465, 1479 (9th Cir. 1995) (holding that California's 1977 death penalty scheme was nonweighing), *cert. denied*, 516 U.S. 1124 (1996). The State's insinuation that the decision in this case will open the floodgates to unwarranted habeas relief in capital cases is specious. This Court should deny review of Question 2.

III. THE STATE SHOULD NOT BE HEARD TO CHALLENGE THE DECISION THAT CALIFORNIA SUPREME COURT CONDUCTED INADEQUATE HARMLESS ERROR REVIEW UNDER *CLEMONS v. MISSISSIPPI* WITH AN UNTENABLE THEORY THAT IT NEVER ARGUED IN THE COURTS BELOW AND THAT FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The State seeks review of the decision that the California Supreme Court conducted inadequate harmless error analysis after invalidating two of the four special circumstances the jury weighed in sentencing Sanders to death. Petition at 13. The Court of Appeals held that "[a]lthough the California court did apparently conduct some type of harmless-error analysis, it did not find, as it was required to do, that the error was harmless beyond a reasonable doubt." App. A at 9004. In reaching this conclusion, the Circuit Court analyzed the relevant portions of

the California Supreme Court's direct appeal opinion, drew an extended analogy between this case and the state court review found inadequate in *Sochor v. Florida*, 504 U.S. 527, noted that the California court never used the words "harmless error" or "reasonable doubt" in assessing the effect of the two invalid special circumstances, and found that the California court erroneously believed it could apply the rule of *Zant v. Stephens*, 462 U.S. 862, to uphold the death verdict because there remained two valid special circumstances. App. A at 9004-06.

The State disputes only one aspect of the Circuit Court's analysis – "its fault[ing] the state court for not using the words 'harmless error' or 'reasonable doubt.'" Petition at 13.[5] The State conjures a convoluted new theory to justify review on certiorari. It argues that (1) this Court should read the state court's decision as applying the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), in this case, even though the decision mentions neither "harmless error" nor "reasonable doubt," because (2) the state court in this case cited to two prior state court decisions, *Allen* and *Silva*, which applied the state law "reasonable possibility" test to assess the impact of invalid special circumstances on the sentence selection process, and (3) 13 years after affirming the death sentence in this case, the state court in a footnote in another case observed that its "reasonable possibility" test was equivalent to the *Chapman* harmless error standard. Petition at 13. The question is not worthy of review on certiorari because it is raised too late, fails to present a substantial federal question, and, on the

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[5] The limited focus of Question 3 disregards much of the Circuit Court's analysis of the inadequacy of the state court's review, including the analogy drawn between this case and *Sochor v. Florida*, 504 U.S. 527. *See*, App. A at 9004-05. The State does not even intimate that this analogy is inaccurate. It also is important to note that the State does not challenge the Circuit Court's decision that the consideration of the two invalid special circumstances had a substantial and injurious effect or influence on Sanders's death sentence under *Brecht v. Abrahamson*, 506 U.S. 619, 638 (1993) and *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Accordingly, Sanders restricts his discussion to the narrow question raised by the State.

merits, is ill-considered at best.

As with the other questions presented for review, the State here seeks certiorari on a novel argument that it never presented to the District Court or the Court of Appeals. In the courts below, the State argued that the California Supreme Court's conclusions that the effect of the heinous-murder and burglary-murder special circumstances was "benign" and that there was "little chance" that the burglary-murder special circumstance prejudiced Sanders satisfied the *Chapman* standard. *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 45-46. As with the State's other questions, its failure to raise below the argument it asserts now should foreclose review in this Court. *See ante* at pages 5-7 and 13-15.

Moreover, the question does not qualify for review on certiorari because it involves only the application of a well-settled principle to a specific situation and does not raise a substantial, undecided issue of federal law. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The State proposes that the state court complied with the *Chapman* harmless error standard by what might be termed "indirect and retrospective incorporation" because years after deciding this case, it stated in another case, *People v. Jones*, 29 Cal.4th 1229, 1264 n.11, 64 P.3d 762, 785 n.11 (2003), *cert. denied*, 540 U.S. 952 (2003), that the state law "reasonable possibility" standard was equivalent to *Chapman*'s "harmless beyond a reasonable doubt" test.[6]

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[6] The State, like the footnote in *Jones*, ignores a critical distinction between the state and federal harmless error standards. Under the California's "reasonable possibility" standard for non-federal constitutional errors at a penalty phase, the burden to prove prejudice rests with the defendant, *People v. Brown*, 46 Cal.3d 432, 448, 758 P.2d 1135, 1144-45 (1988), whereas under the federal constitutional harmless error standard, the burden is on the government to prove that the error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. at 24.

Moreover, the State does not claim that this equivalence was established at the time Sanders's direct appeal was decided. On the contrary, the California Supreme Court distinguished between the federal constitutional and state law harmless error standards and treated (continued...)

The footnoted comment in another case in 2003 cannot reach back to cure the state court's constitutionally inadequate review of this case in 1990. In *Stringer*, this Court rejected a similar argument when the State of Mississippi attempted to rely on *Lowenfield v. Phelps*, 484 U.S. 231 (1988) to argue that the holding in *Clemons* that Mississippi's heinous, atrocious and cruel aggravating circumstance was unconstitutionally vague created a new rule under *Teague*. *Stringer v. Black*, 503 U.S. at 236 ("It is a fiction for the State to contend that in 1984 its courts relied on a 1988 decision.") The Court also should reject the State's argument here.

But even if the state court had announced a new construction of the state law "reasonable possibility" test before it had decided Sanders's direct appeal, its review still would have been insufficient under *Clemons*. Contrary to the State's suggestion, the citation to the decisions in *People v. Allen*, 42 Cal.3d 1222, 1281, 729 P.2d 115, 152-53 (1986), *cert. denied*, 484 U.S. 872 (1987), and *People v. Silva*, 45 Cal.3d 604, 632-36, 754 P.2d 1070, 1085-87 (1988), *cert. denied*, 488 U.S. 1019 (1989), which applied the "reasonable possibility" standard, is not a proxy for harmless error analysis. Rejecting the State of Florida's similar argument in *Sochor v. Florida*, 504 U.S. 527, 540 (1992), this Court ruled that "allusions by citation . . . cannot even arguably substitute for explicit language signifying that the State Supreme Court reviewed for harmless error." The same holds true here. There simply is no evidence in the direct appeal decision that the California Supreme Court conducted the scrupulous harmless error analysis mandated by *Clemons*. The Court should deny review of Question 3.

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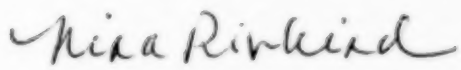
[6] (...continued)
them as distinct tests. *See People v. Brown*, 46 Cal.3d at 447-48, 758 P.2d at 1144-45 (adhering to state "reasonable possibility" test for reviewing non-federal errors at a capital penalty phase); *People v. Gordon*, 50 Cal.3d 1223, 1267, 792 P.2d 251, 278 (1990) (applying both state "reasonable possibility" and federal *Chapman* standards), *cert. denied*, 499 U.S. 913 (1991).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: February 9, 2005.

Respectfully Submitted,



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No. 04-980

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent, RONALD L. SANDERS, requests leave to file a Brief in Opposition to the Petition for Writ of Certiorari, which was docketed in this case on January 24, 2005, without prepayment of costs and to proceed in this matter *in forma pauperis*. Respondent has been granted leave to so proceed before the United States District Court for the Eastern District of California and the United States Court of Appeals for the Ninth Circuit. No affidavit is attached, as the United States District Court appointed counsel for respondent pursuant to 21 U.S.C. § 848(q).

DATED: February 9, 2005.

Respectfully submitted,

Nina Rivkind

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Counsel of Record
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RONALD L. SANDERS

(3) COPY

No. 04-980

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IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-980

JILL L. BROWN, Warden, *Petitioner,*

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INTRODUCTION

Respondent spends the bulk of his brief in opposition to certiorari criticizing the state for not raising various arguments earlier than it did. However, the state's arguments did not arise until the Ninth Circuit Court of Appeals rendered its decision in this case. California has always considered itself a non-weighing state, and the state has never conceded that California is a weighing state. The Ninth Circuit's classification of California as a weighing state created a new rule because it applied a new definition of "weighing" which has never before been employed by this Court. The Ninth Circuit's decision ignores that California juries consider all circumstances of the crime without any guidance as to how to weigh those factors to determine penalty. Finally, although not constitutionally required, California courts have repeatedly conducted their own state-law harmless error review in cases such as this one, and that standard is equivalent to the standard of *Chapman v. California*, 386 U.S. 18 (1967).

ARGUMENT

I.

THIS NINTH CIRCUIT CLASSIFICATION OF CALIFORNIA AS A "WEIGHING" STATE MISREADS THIS COURT'S DECISIONS AND CONFLICTS WITH THE STATE SUPREME COURT'S DETERMINATION THAT CALIFORNIA IS NOT A "WEIGHING" STATE

A. The Standard Used By The Ninth Circuit To Classify California As "Weighing" Conflicts With Authority From This Court

This Court has explained the difference between a weighing state and a non-weighing state. In a weighing state, a jury weighs specific statutory aggravating factors, and only those factors, against statutory mitigating factors, whereas in a non-weighing state, the aggravating factors used for eligibility have no specific function in selection. Rather, "'in making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.'" [Citation.] *Stringer v. Black*, 503 U.S. 222, 229-230 (1992).

Thus, this Court has distinguished between those states which limit the penalty selection task to consideration of a finite list of aggravating factors, as does Mississippi[1] and those states in which the aggravating factors used during the eligibility phase have "no specific function" in selection, but rather allow the jury to consider all the circumstances of the proceeding. *Id.*

While it is true that California has a list of aggravating factors, the first item in that list instructs juries to consider "the

1. See Miss. Code. Ann. § 99-19-101(5).

circumstances of the crime of which the defendant was convicted in the present proceeding. . . ." Cal. Pen. Code. sec. 190.3, subd. (a). Thus, as distinguished from the rather narrow list in Mississippi's statute, California instructs juries to consider all circumstances just like Georgia. This significant expansion of evidence that may be considered offsets the notion that an invalid special circumstance will have any effect on penalty selection.

Moreover, in Mississippi, the aggravating factors serve a specific function in penalty selection. As the Mississippi statute explains,

> (3) For the jury to impose a sentence of death, it must unanimously find in writing the following:
> * * *
> (b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and
> (c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

Miss. Code. Ann. § 99-19-101(3). In contrast, California juries are not required to make any "sufficiency" assessment at all. Rather, they are instructed merely to "take into account any of the following factors, if relevant." Cal. Pen. Code. sec. 190.3. Thus, the aggravating factors, incorporated through Cal. Pen. Code, sec. 190.3, subd. (a), do not have any "specific" function in penalty selection. Quite the contrary, this Court has already held that California's statute does not specifically instruct the jury how to weigh the facts and aggravating circumstances. *Tuilaepa v. California*, 512 U.S. 967, 979, 980 (1994). California juries apply the California factors as they choose. *People v. Brown*, 40 Cal.3d 512, 544 (1985). And, the decision is normative, not a mechanical counting of factors as it is under Mississippi's "sufficiency" test. *People v. Millwee*, 18 Cal. 4th 96, 164 (1998).

California juries only consider invalid special circumstances (when they exist) by virtue of the second clause

of California Penal Code section 190.3, subdivision (a). And, this "factor (a)" is only one of eleven statutory factors which together include virtually any evidence about the crime or the defendant that is even remotely relevant. This statutory directive to consider special circumstances in California is virtually identical to the "erroneous" instruction given by the state court in *Zant v. Stephens*, 462 U.S. 862 (1983), where the trial judge told the jury they could consider various statutory aggravating circumstances, including one found invalid. *Id.* at 865-866. This Court concluded that the error in the trial court's instruction was "merely a consequence of the statutory label 'aggravating circumstance'" which had "an inconsequential impact on the jury's decision regarding the death penalty." *Id.* at 888-889. Because the jury was expressly told to consider all facts and circumstances in both aggravation and mitigation, "any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process." *Id.* at 889.

Thus, it is quite apparent that in California, where juries are always told to consider all "the circumstances of the crime of which the defendant was convicted in the present proceeding," the impact on penalty selection by virtue of the statutory directive to also consider special circumstances is just as "inconsequential" as it was in *Zant*. Accordingly, under this Court's precedent, California's statutory command, even if "erroneous" as was the instruction in *Zant*, does not rise to the level of constitutional error found in *Stringer* or *Clemons v. Mississippi*, 494 U.S. (1990). Rather, California is, at worst, the equivalent of a non-weighing state with an "erroneous" statutory instruction.

Despite this Court's established distinction between weighing and non-weighing states, the Ninth Circuit held that California "qualifies as a weighing state, because the jury's sentencing discretion is not boundless. . . ." Appendix A at 9002. The determination of whether a state is a weighing state has never depended solely upon whether the discretion is "boundless." Rather, this Court has looked at the precise nature

of the aggravating factors each state's statute contains, and more importantly, the role such factors play in the selection process. Thus, the Ninth Circuit's determination conflicts with the decisions of this Court, and certiorari should be granted to resolve the conflict. Supreme Court Rule 10(c).

B. The California Supreme Court Has Held That California Is Not A Weighing State, And The Ninth Circuit's Holding To The Contrary Presents A Classic Basis For Certiorari Review

The California Supreme Court has repeatedly held that it is a non-weighing state, and the Ninth Circuit decision below on this federal question is in direct conflict. Supreme Court Rule 10(a).

In *People v. Silva*, 45 Cal.3d 604, 632 (1988), the California Supreme Court expressly held that this court's decision in *Zant* (which applied to non-weighing states) was applicable to California death penalty cases where one or more special circumstances were invalid. Indeed, a quick glance at the dissent in *Silva* reveals that the very issue presented in this case was expressly rejected by the state court. *Id.* at 643-644. However, the majority of the state supreme court rejected that argument. Since that decision, the California Supreme Court has cited *Zant* when rejecting claims based upon the invalidity of one or more special circumstances, including in this case. *People v. Sanders*, 51 Cal.3d 471, 520 (1990). Subsequently, the California Supreme Court has found *Stringer* inapplicable to California. *People v. Bacigalupo*, 6 Cal. 4th 457, 476 (1993)

Respondent makes much of the fact that California's statute contains the word "outweigh" (see Cal. Penal Code sec 190.3) and that the selection process has been described using various forms of the word "weigh." Opposition at 9-10. However, he misconstrues the significance of the weighing/non-weighing distinction this Court's jurisprudence has drawn. The fact that a court describes the process of penalty selection as

"weighing" has no bearing on whether the state is a "weighing" state as this Court has used that term of art. Indeed, even when discussing the "non-weighing" Georgia statute, this Court discusses whether jurors would give an aggravating circumstance any "greater" or "special weight." *Zant*, 462 U.S. at 888, 890. The California Supreme Court has explained that "[i]n this context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description." *Brown*, 40 Cal.3d at 541 (1985).

The characterization of this issue as a simple matter of whether some form of the word "weigh" appears in the state or the jury instructions is itself simplistic. Opposition at 13. The terms "weighing" and "non-weighing" are terms of art with meanings separate from the phrasing used to describe the process of deliberation. California has recognized this Court's jurisprudence on this point, and has repeatedly deemed itself to be a non-weighing state, as in *Zant*.

C. Petitioner Has Never Conceded That California Is A Weighing State

Contrary to the suggestion by respondent (see Opposition at 5), the state has never accepted respondent's argument that California is a weighing state. Rather, the state's position all along has been that the harmless error standard of review applied by the California Supreme Court in this case is more than sufficient to pass constitutional muster. Because that was dispositive, the state "assumed" for purposes of argument that California was a weighing state, but argued that *Clemons* did not apply because the case did not present the type of automatic affirmance approach rejected in *Clemons*. *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 42, 45.

Prior to the Ninth Circuit's published decision in this case, there was no Ninth Circuit case law explaining how California could possibly be classified as a weighing state. All that was extant prior to this decision was a single clause in *Allen v.*

Woodford, 366 F.3d 823, 857 (9th Cir. 2004) declaring California a weighing state with absolutely no analysis and only a citation to *Silva v. Woodford*, 279 F.3d 825, 829, fn. 1 (9th Cir. 2002), which itself makes the same declaration with no supporting analysis. In *Allen*, of course, the Ninth Circuit affirmed the denial of the habeas corpus petition, and the state therefore had no reason, nor indeed any vehicle, to challenge the "weighing" designation. In *Silva*, the Ninth Circuit found ineffective assistance of counsel during the penalty phase, but the unsupported determination that California is a weighing state was not implicated because there were no issues relating to invalid special circumstances raised in that appeal. Thus, again, there was no practical basis for the state to challenge the Ninth Circuit's incorrect designation.

It was not until the opinion below in this case, where habeas relief was expressly predicated upon the erroneous designation of California as a weighing state, that the issue became squarely presented. Accordingly, this Court should grant review on Question 1.

II.

TEAGUE IS PROPERLY RAISED IN THE PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit's determination that California is a "weighing" state was an application of a new rule of constitutional law. *Teague v. Lane*, 489 U.S. 288 (1989) provides a defense for states against courts applying new rules of criminal procedure on collateral review. Until the Ninth Circuit rendered its decision in this case, the *Teague* issue was not apparent, as it was not until the Ninth Circuit ignored this Court's precedent and employed a new standard for designating states as "weighing" states that a new rule had been created.

This Court has observed that despite a state's failure to raise the issue earlier, it "undoubtedly ha[s] the discretion to reach the State's *Teague* argument. . . ." *Schiro v. Farley*, 510

U.S. 222, 229 (1994). Moreover, the Ninth Circuit's failure to address *Teague* is in conflict with the Fifth Circuit's approach in *Jackson v. Johnson*, 217 F.3d 360, 363 (5th Cir. 2000), where the court stated that

> absent a compelling, competing interest of justice in a particular case, a federal court should apply Teague even though the State has failed to argue it. Fundamental principles of fairness are not the states' to waive.

Moreover, in *Godinez v. Moran*, 509 U.S. 389, 397 fn. 8 (1993), this Court faulted the state "because petitioner did not raise a *Teague* defense in the lower courts *or* in his petition for certiorari." Emphasis added. Here, in contrast, the state did raise the issue in the petition for certiorari. Accordingly, review should be granted on Question 2.

III.

THE NINTH CIRCUIT IGNORED STATE LAW REGARDING THE HARMLESS ERROR ANALYSIS THAT IS APPLIED WHEN A CALIFORNIA SPECIAL CIRCUMSTANCE IS FOUND INVALID

Contrary to respondent's argument (see Opposition at 19), the state has at all times argued that the state court reviewed the presence of invalid special circumstances under a harmless-error standard that was constitutionally sufficient. Respondent's brief in opposition actually makes the state's argument stronger. See Opposition at 18. The state court found the error "benign" and cited prior state court decisions applying the state-law reasonable possibility test. Appendix C at 67-68. This California state test is the same as the *Chapman* standard.

Respondent's only substantive criticism of the reasoning is that the state court decision cited in the petition, *People v. Jones*, 29 Cal.4th 1229, 1264 n. 11 (2003) postdates the state court decision in this case by 13 years. Opposition at 18. However, even a passing glance at the *Jones* case reveals that it

cites cases from 1998 and 1991. And, upon reading those cases, it is apparent that the state court had equated the state law reasonable probability test with the *Chapman* standard as early as 1988—two years *before* the state court affirmed this case. *People v. Ashmus*, 54 Cal.3d 932, 965 (1991) (discussing the opinion to the same effect in *People v. Brown* (1988) 46 Cal.3d 432, 467 (conc. opn. of Mosk, J.)).

Thus, contrary to respondent's assertion, the state court did not create a fiction and reach back in time to render a post-hoc rationalization. See Opposition at 20. Rather, the state court did what courts frequently do: it relied upon long-settled principles of state law without necessarily citing to the first case to establish the proposition.

Although respondent criticizes the state supreme court for failing to cite *Chapman*, it must be remembered that "[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation." *Bell v. Cone*, ___ U.S. ___, 123 S.Ct 847, 2005 U.S. LEXIS 1369, *15. Rather, the courts must presume that the state court followed its own law. *Id.* In light of California's long-standing state-law precedent and the state court's reliance upon that precedent, the Ninth Circuit's determination that the state court failed to find the error harmless beyond a reasonable doubt (Appendix A at 9004) is in direct conflict with the state court on an issue of state law which directly impacts the underlying federal question presented in this case. The California Supreme Court is the final arbiter of state law. *Stringer*, 503 U.S. at 234 (1992). The Ninth Circuit cannot be permitted to ignore state law simply to manufacture federal constitutional error. This Court should therefore grant certiorari review on Question 3.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be granted.

Dated: February 22, 2005

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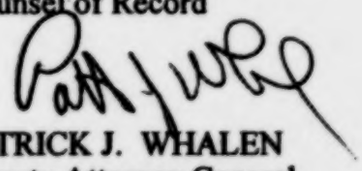

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IN THE

Supreme Court of the United States

JILL L. BROWN, Warden,

Petitioner,

vs.

RONALD L. SANDERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Does the rule of *Zant* v. *Stephens* permit affirmance of a death sentence notwithstanding erroneous findings on two of four special circumstances when:

1) one special circumstance is sufficient to make the defendant eligible for capital punishment;

2) the stricken circumstances and the evidence supporting them involve matters which are relevant to culpability and proper subjects of consideration in sentencing; and

3) state law permits the sentencer to consider all "circumstances of the crime," which includes all of the facts supporting the stricken circumstances.

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IN THE

Supreme Court of the United States

JILL L. BROWN, Warden,

Petitioner,

vs.

RONALD L. SANDERS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, a sentence of death was overturned because the jury found two "special circumstances" which were later found to be insufficient to separate death-eligible murders from other murders, despite the facts that (1) this murderer was eligible

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

under other, valid factors also found by the jury, and (2) the stricken factors added nothing of substance to the final selection decision that was not properly considered under other, valid factors. Such an unnecessary overturning of a valid, thoroughly deserved, and long overdue sentence is a miscarriage of justice and contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Twenty-four years ago, defendant Ronald Lee Sanders, Donna Thompson, and Brenda Maxwell attempted to rob Dale Boender and Janice Allen, but failed. "[D]efendant was worried Boender could identify him." See *People* v. *Sanders*, 51 Cal. 3d 471, 485-486, 797 P. 2d 561, 565-566 (1990). A few days later, defendant and John Cebreros pushed their way into Boender and Allen's apartment, bound them with electrical cord, stole drugs and money, and fractured both of their skulls. Boender survived and identified defendant, but Allen died of her wounds.

Sanders was convicted of first-degree murder, attempted murder, robbery, burglary, and attempted robbery. *Id.*, at 485, 797 P. 2d, at 565. Burglary in California is entry of a building with the intent to commit larceny or any felony. See Cal. Penal Code § 459. The jury was instructed on several variants of first-degree murder, including premeditation, robbery felony murder, and burglary felony murder. The jury was further instructed that the intent for a burglary could be, among other possibilities, intent to commit an assault. See 51 Cal. 3d, at 509, 797 P. 2d, at 582. Although California law does allow intent to assault as the *mens rea* of burglary, it does not permit an assault-based burglary as the basis for a felony-murder instruction. See *ibid.*, 797 P. 2d, at 582. The California Supreme Court affirmed the first-degree murder verdict based on the jury's robbery findings. *Id.*, at 510, 797 P. 2d, at 582.

Concurrently with the guilt verdict, the jury found four special circumstances: robbery felony murder, burglary felony murder, murder of a witness to prevent her testimony, and "especially heinous, atrocious and cruel." See *id.*, at 485, 797 P. 2d, at 565; Cal. Penal Code §§ 190.2(a)(17)(i), (a)(17)(vii), (a)(10), (a)(14). One special circumstance must be found to make the defendant eligible for the death penalty. See Cal. Penal Code § 190.2(a). The California Supreme Court set aside the burglary felony murder finding for the same reason as the burglary theory of felony murder. The "especially heinous, atrocious and cruel" circumstance was also set aside under a prior decision of the California Supreme Court, see *Sanders*, 51 Cal. 3d, at 520, 797 P. 2d, at 589, despite the fact that the language of the statute and instruction was copied from the language approved by this Court in *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976) (lead opinion).

In the penalty phase, Sanders instructed his attorney not to present mitigating evidence. The trial judge appointed independent counsel to advise Sanders and a psychiatrist to examine him. Sanders persisted in this choice despite the attempts of court and counsel to dissuade him. See *Sanders*, 51 Cal. 3d, at 524-525, 797 P. 2d, at 592-593.

The jury returned a verdict of death. The California Supreme Court rejected the argument that the stricken special circumstances required reversal of the penalty verdict. All of the facts underlying these circumstances were admissible in the penalty phase and were proper subjects of the jury's consideration under state law. See 51 Cal. 3d, at 520-521, 797 P. 2d, at 589-590.

Sanders filed a federal habeas petition on December 20, 1993. See *Sanders* v. *Woodford*, 373 F. 3d 1054, 1058 (CA9 2004). This petition contained unexhausted claims, and Sanders filed a state habeas petition to exhaust them. See *ibid.* Following denial of the state habeas petition, he amended his

federal habeas petition on September 25, 1999.[2] The District Court denied the petition on August 24, 2001. The Court of Appeals for the Ninth Circuit reversed, finding that the California Supreme Court had performed an inadequate harmless error analysis, citing *Sochor* v. *Florida*, 504 U. S. 527 (1992). See 373 F. 3d, at 1064.

SUMMARY OF ARGUMENT

The term "weighing State" is a misnomer and should be abandoned.

Once the defendant has been found eligible for capital punishment by the finding of at least one properly defined circumstance, states may either limit the prosecution's case in aggravation to those same eligibility circumstances or open the case up to a broader or even unlimited range of circumstances. This includes circumstances too vague to be valid eligibility circumstances.

The reason the vague circumstance in *Zant* v. *Stephens* was harmless was that Georgia allowed consideration of broad circumstances in the selection decision. For this reason, the substance of the stricken circumstance was properly before the jury, with or without the finding of that circumstance in the eligibility decision. This is what makes the Georgia system different from the States designated "weighing States." In reality, all sentencers "weigh." *Zant* v. *Stephens* applies to any

2. The Court of Appeals held that the deference standard of 28 U. S. C. § 2254(d) does not apply because the initial petition was filed before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *ibid.*; *Lindh* v. *Murphy*, 521 U. S. 320, 336 (1997); *Woodford* v. *Garceau*, 538 U. S. 202, 207 (2003). This Court has not resolved whether § 2254(d) applies to an amended petition filed after AEDPA's effective date, and the State did not seek review of the Court of Appeals' holding on this point.

state with broadly defined aggravating circumstances in the selection decision.

The California Supreme Court does not have a rule of automatic affirmance but instead examines each case to insure that the premise of *Zant* v. *Stephens* is true. That is, it verifies that the substance of the stricken eligibility circumstance was properly before the jury under another, valid "special" circumstance or under California's broad selection circumstances. The state court properly applied *Zant* to this case.

ARGUMENT

"On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. __ (No. 04-163, May 23, 2005) (slip op., at 1). The phrase "weighing State" has taken on a life of its own in this way, and it should be abandoned for the reasons discussed in Part III, *infra*. First, though, there are two misconceptions that need to be cleared away.

I. There is no *Godfrey* error in this case.

In most of the cases leading up to this one, the circumstance in question was invalid because it failed to perform the narrowing function required by the Eighth Amendment in capital cases under the standard established in *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion). See, *e.g.*, *Stringer* v. *Black*, 503 U. S. 222, 228 (1992). However, the "especially heinous, atrocious or cruel" instruction given to the jury in the present case complies with *Godfrey*. It is important to be clear on this point, lest a dictum in this case call into question the well-established law validating instructions that have long been used and are still in use in other jurisdictions. See, *e.g.*, *Lynch* v. *State*, 841 So. 2d 362, 379 (Fla. 2003) (Pariente, J., concur-

ring in the result) (noting codification of similar instruction in Florida), cert. denied, *Lynch* v. *Florida*, 540 U. S. 867 (2003).

When the drafters of California's death penalty law crafted the "especially heinous" special circumstance, they drew upon what appeared to be the safest possible source—language expressly upheld by this Court against a vagueness attack. Compare Cal. Penal Code § 190.2(a)(14), with *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976) (lead opinion). One would have thought that the codification verbatim of language approved by the Supreme Court of the United States was ironclad protection against a federal constitutional attack in any other court. However, in the surreal environment of the California Supreme Court's pre-1987 death penalty jurisprudence, nothing was ever safe. In *People* v. *Superior Court (Engert)*, 31 Cal. 3d 797, 806, 647 P. 2d 76, 81 (1982), the California Supreme Court held that the *Proffitt*-approved language violates the Due Process Clause of the Fourteenth Amendment as well as the Due Process Clauses of the California Constitution. See Cal. Const., Art. I, §§ 7(a), 15.

One reason given for not following *Proffitt* was differences in the Florida and California systems. See *Engert*, 31 Cal. 3d, at 804, 647 P. 2d, at 79. While the systems do differ, as discussed *infra*, at 19, they do not differ in a way that matters on this point. The "especially heinous" circumstances in both California and Florida serve to separate the cases where the death penalty may be considered from those where it may not, and that is the function to which the *Godfrey* vagueness requirement applies. See Part II, *infra*. The other reason given was to distinguish the Eighth Amendment requirement from the Due Process Clause requirement. See *id.*, at 804-805, 647 P. 2d, at 79-80. As *Maynard* v. *Cartwright*, 486 U. S. 356, 361-362 (1988) subsequently made clear, the difference in these two clauses cuts the other way. While the Due Process Clause permits a statute which is vague at the edges to still be applied to cases clearly within its scope (except in First Amendment

cases), the Eighth Amendment forbids any use of a vague circumstance for determining eligibility for the death penalty.

The Fourteenth Amendment holding of *Engert* could not be reviewed by this Court at the time, because the judgment also rested on the adequate and independent basis of the state constitution. The California Supreme Court has not seen fit to reconsider the question in the years since.[3] By finding "*Engert* error" in the present case, the California Supreme Court held that the use of the "especially heinous" instruction violated the California Constitution's Due Process Clauses, and that holding is binding on federal courts. Analysis of the present case must proceed on the assumption that the "especially heinous" instruction was error, but it was not federal constitutional error, and the opinion in this case should not call into question the similar statutes and instructions in other jurisdictions. See, *e.g.*, 18 U. S. C. § 3592(c)(6); *Jones* v. *United States*, 527 U. S. 373, 377, and n. 1 (1999).[4]

II. A factor which is too vague to be used for the eligibility decision may be perfectly valid for the selection decision.

A. Eligibility and Selection.

This Court's "capital punishment cases under the Eighth Amendment address two *different* aspects of the capital

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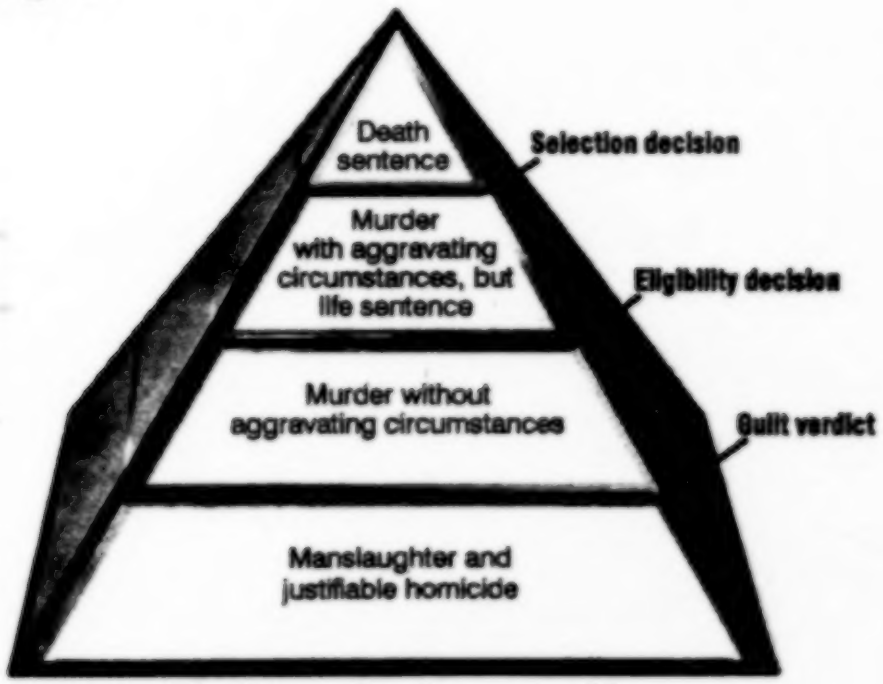
3. Another special circumstance for murders that "involve[] the infliction of torture," Cal. Penal Code § 190.2(a)(18), covers most if not all of the same cases as paragraph 14's "unnecessarily torturous to the victim." Given that there is little or no permanent effect on the scope of California's death penalty law, the California Supreme Court may have concluded that considerations of *stare decisis* weigh against reopening the *Engert* question.

4. The Court of Appeals in *Jones* had rejected a *Maynard* challenge to the federal statute. See *United States* v. *Jones*, 132 F. 3d 232, 249-250 (CA5 1998). Jones did not seek review of this holding.

decision making process: the eligibility decision and the selection decision." *Tuilaepa* v. *California*, 512 U. S. 967, 971 (1994) (emphasis added). In recent years, we have seen a sharpening of the distinction between these two decisions and the factors that go into them. The eligibility factors must now be found by a jury, but the selection decision may still be made by the judge. See *Ring* v. *Arizona*, 536 U. S. 584, 597-598, n. 4, 609 (2002). A plurality of the Court has indicated that its confused precedents on double jeopardy and capital sentencing may be resolved by holding double jeopardy applicable to the eligibility decision but not the selection decision. See *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 110-112 (2003).

In *Zant* v. *Stephens*, 462 U. S. 862, 870-872 (1983), this Court quoted the Georgia Supreme Court's response to a certified question describing the process for determining which of the many persons who commit homicide will be sentenced to death. The pyramid metaphor of this response, illustrated in

Figure 1



The *Zant* v. *Stephens* pyramid.

Figure 1, is quite useful for understanding all jurisdictions' current capital sentencing processes, so we summarize it here.

Briefly, all homicides are in the pyramid, and several planes divide the homicides into levels of increasing culpability and severity of punishment. The first plane, the guilt verdict, separates murder from manslaughter and justifiable homicide. In states that divide murder into degrees, see, *e.g.*, Cal. Penal Code § 189, it also separates first-degree murder from second-degree murder. The second plane separates the murder cases (or first-degree murder cases) into those where the death penalty may be considered and those where it may not. This is the eligibility decision. It requires a finding of at least one statutory circumstance. The final plane separates the cases in which the death penalty will actually be imposed from those where it will not, even though the defendant is eligible for it. This is the selection decision.

Although they differ in the details, all capital sentencing systems in use in the United States today follow the same broad outline. *Gregg* v. *Georgia*, 428 U. S. 153 (1976), its companion cases, and their progeny effectively require it. All systems have an eligibility determination to narrow the class of potentially capital cases, and all systems follow this decision with a selection decision to determine whether to actually sentence an eligible defendant to death. See *Tuilaepa*, 512 U. S., at 971-973.

Using the pyramid metaphor, the plane that separates the death-eligible cases from those where death cannot be legally imposed is qualitatively different from the plane that separates the cases where death will actually be imposed from those who will be spared the death penalty, even though legally eligible for it. The eligibility decision is essentially factual, see *Tuilaepa*, 512 U. S., at 973, while the selection decision is necessarily discretionary.

The rule of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) preserves the factual nature of the eligibility decision. A

circumstance that "could fairly characterize almost every murder," *id.*, at 428-429, is insufficient to perform the narrowing function required at this stage. See also *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988).

At the selection stage, on the other hand, the state is not required to define the factors that the sentencer may consider at all. Indeed, on the mitigating side the state *must* permit any aspect of the crime or of the defendant's character or record that he wishes to proffer as mitigating. See *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). The state can do the same on the aggravating side if it wishes. The Georgia statute considered in *Gregg*, *supra*, authorized consideration of *any* appropriate aggravating circumstance in the selection decision, see 428 U. S., at 197, and the lead opinion not only upheld the procedure but commended it. See *id.*, at 203-204. The state can, if it wishes, limit the prosecution's case in aggravation to the same factors found for eligibility, see, *e.g.*, *Zant*, 462 U. S., at 878, n. 17, but this limitation is not required.

B. California v. Ramos.-

Two weeks after *Zant* v. *Stephens*, this Court made clear that the broad-circumstance principle of *Gregg* and *Zant* applies equally to a state where the jury is instructed to "weigh." Discussing the essential difference between the eligibility determination and the final sentencing decision in such a state, the Court said this in *California* v. *Ramos*, 463 U. S. 992, 1008-1009 (1983) (emphasis added):

> "*Once the jury finds that the defendant* falls within the legislatively defined category of persons *eligible* for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, *the jury then is free to consider a myriad of factors* to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. 'But *the Constitution does not require the jury to ignore other possible . . . factors* in the process of selecting . . .

> those defendants who will actually be sentenced to death.' *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983) (footnote omitted). As we have noted, the essential effect of the Briggs Instruction [regarding the possibility of commutation] is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See *supra*, at 1003. This element '*is simply one of the countless considerations weighed by the jury* in seeking to judge the punishment appropriate to the individual defendant.' 462 U. S., at 900 (Rehnquist, J., concurring in the judgment).[22]

"[22] Consideration of the commutation power does not undermine the jury's statutory responsibility to *weigh* aggravating factors against mitigating factors and impose death only if the former outweigh the latter. *The desirability of the defendant's release into society is simply one matter that enters into the weighing process.* Moreover, the fact that the jury is given *no specific guidance* on how the commutation factor is to figure into its determination *presents no constitutional problem.* As we held in *Zant* v. *Stephens*, *supra*, the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.' *Id.*, at 875."

Thus, this Court has quite explicitly held that the sentence selection process is *not* governed by the same strict specificity requirements as the death eligibility determination. Moreover, as footnote 22 makes clear, the *Ramos* Court did so while very much aware that the statute in question called for a "weighing" process and that the factor before the Court was "one matter that enters into the weighing process."

C. Narrowing: Necessary for Rationalization.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court struck down the existing system of unfettered discretion in capital sentencing, effectively overruling *McGautha* v. *California*, 402 U. S. 183, 207 (1971). None of the five Justices voting to reverse in *Furman* joined any of the others' opinions. Notwithstanding this fracture, it is clear enough what motivated a majority of the Court to make the dramatic about-face that it did. Pre-*Furman* death penalty law provided far too much leeway for racial discrimination. See *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring); *id.*, at 501 (Stevens, J., dissenting).

The evil exposed in *Furman* was the result of two concurrent causes: the breadth of offenses for which death was an available punishment and the lack of guidance for selecting those actually sentenced to death from the eligible offenders.

> "[T]he risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. When the *Furman* case was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnaping and . . . murder in that class." *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting), overruled on other grounds, *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002).

To address this problem, the post-*Furman* statutes all have some form of "narrowing" for the crime of murder, and this Court has several times referred to narrowing as a constitutional requirement. See *Zant*, 462 U. S., at 877; *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988); *Tuilaepa*, 512 U. S., at 972.

For the most part, the identification of factors which separate the death-eligible defendants from the others is a matter for legislative and not judicial decision. The one major limitation on eligibility factors is tightly bound to the purpose

of those factors. That is, "aggravating [eligibility[5]] circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis* v. *Jeffers*, 497 U. S. 764, 776 (1990).

Because eligibility turns on a "yes or no" answer to a question, that question must be one which is susceptible to such an answer. Because all murders are heinous, asking a jury whether the murder is "especially heinous" fails to provide a principled distinction. See *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988). For eligibility circumstances to work properly, the jury must be asked to find a fact true or false, and not simply to place the crime on an unmarked continuum of heinousness, with no concrete indication as to where the line is drawn between "especially heinous" and "ordinarily heinous."

Narrowing the eligible class requires a factual determination, but the fact need not be externally visible or mathematically precise. The defendant's state of mind can be a valid eligibility circumstance, since state of mind is a factual determination, albeit a difficult one. See *Arave* v. *Creech*, 507 U. S. 463, 473-474 (1993).

D. Mitigation: Necessary for Individualization.

The most obvious answer to the *Furman* problem of arbitrariness and discrimination would appear to be mandatory sentencing. However, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) struck down mandatory sentencing. The *Woodson* plurality gave three reasons for this holding: collective legislative judgment, see *id.*, at 298-299, the inevitable widespread nullification of a sweeping, mandatory death penalty for first-degree murder, *id.*, at 291-296, and an independent constitutional imperative of individualized sentencing. The

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5. Much of the confusion in this area stems from the use of the term "aggravating circumstances" for both eligibility factors and discretionary sentencing considerations.

plurality all but admitted the latter had no basis in precedent, see *id.*, at 304 ("enlightened policy rather than a constitutional imperative"), but decided to declare the imperative nonetheless. *Id.*, at 303-305.

The nullification point is far and away the strongest support for the *Woodson* rule. If the system has no formal outlet for the extension of mercy in appropriate cases, the operators of the system will find informal ways. This went on for centuries in England, from the faking of reading tests for "benefit of clergy," see F. Maitland & F. Montague, A Sketch of English Legal History 72-73 (Colby ed. 1915), to bogus insanity verdicts, which dropped sharply upon the abolition of capital punishment. See J. Wilson, Thinking About Crime 187 (1976). Justice and equality are better served by keeping the inevitable mercy decision out in the open and permitting the state to structure it. See Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 109 (1987).

The final choice between life imprisonment and death is fundamentally different from the eligibility determination. See *Ramos* quote, *supra*, at 10-11. While the Constitution requires the eligibility determination to be based on legislatively specified facts, see *supra*, at 13, the Constitution has been construed to require that the sentencer be permitted to consider "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U. S., at 604 (plurality opinion).

Lockett is based on a conviction that the complexities of human behavior preclude any attempt to list the factors that ought to inform the final sentencing decision. An attempt to limit the factors in mitigation, the plurality believed, creates

"the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.*, at 605.[6]

E. Aggravation: The Indispensable Flip Side.

If the final stage of capital sentencing is truly to be individualized, mitigating circumstances cannot be considered in a vacuum. Whether the factors proffered in mitigation *really do* "call for a less severe penalty" necessarily depends on the relevant factors in aggravation.

A hypothetical will illustrate. A and B are both convicted of rape and murder, a death-eligible offense. They are equally culpable of the crime. They both offer the same mitigation: they were drunk. Both have criminal records, so neither can claim lack of a record as mitigation. A's record, however, is a single prior conviction of unarmed robbery, while B has committed numerous previous rapes, including exceptionally brutal and sadistic acts.

Prior conviction of a violent felony less than murder is generally not an eligibility circumstance. Indeed, in *Zant* v. *Stephens* the state court had previously stricken such a circumstance as unconstitutionally vague. 462 U. S., at 867. Yet if the criminal record cannot be considered as aggravating, the sentencing profiles of A and B are badly skewed. They appear to be equally deserving of the death penalty, when in fact B is far more deserving.

For mitigating evidence to perform its accuracy-enhancing function, it must be presented and considered in the context of aggravating evidence. Mitigation without aggravation makes

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6. The *Lockett* opinion does not explain why the people of a State cannot collectively decide, through their legislature, that a factor such as voluntary intoxication is simply not mitigating. Cf. 4 W. Blackstone, Commentaries 25-26 (1st ed. 1769); *Montana* v. *Egelhoff*, 518 U. S. 37, 44-45 (1996) (plurality opinion); *id.*, at 57-59 (Ginsburg, J., concurring in the judgment). Under *Lockett* and *Mills* v. *Maryland*, 486 U. S. 367 (1988), each juror must decide that individually.

no more sense than peaks without valleys. Just as accuracy is enhanced by consideration of all relevant mitigating factors, so it is enhanced by consideration of all relevant aggravating factors. See *Tuilaepa*, 512 U. S., at 984 (Stevens, J., concurring in the judgment).

Time and again, this Court has reiterated the legitimacy of broad aggravating circumstances in cases where the jury is instructed to "weigh." In *Ramos*, quoted *supra*, at 10-12, the factor of future dangerousness was upheld. *Payne* v. *Tennessee*, 501 U. S. 808 (1991) permits consideration of the impact on the victim.

Both *Ramos* and *Payne* upheld, under statutes which instruct juries to "weigh," the consideration of aggravating factors which would fail the test of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, *supra*. These latter cases struck down the *eligibility* factors of "outrageously or wantonly vile" and "especially heinous," because every murder is vile and heinous, and the additional adverbs provide no meaningful place to draw the line. See *Maynard*, 486 U. S., at 364.

By the same logic, "future dangerousness" would fail as an eligibility circumstance, because virtually all murderers will be dangerous, although some will be more so than others. Yet *Ramos* expressly upheld it as a "weighing" circumstance. Victim impact would similarly fail *Godfrey/Maynard*. All murders have victims and virtually all victims leave survivors. See *Payne*, 501 U. S., at 838 (Souter, J., concurring). The prosecutor in *Payne* argued that victim impact was relevant to the "especially heinous" factor in the sentencing phase, see *id.*, at 815-816, but an eligibility finding under this circumstance based on victim impact alone would unquestionably be insufficient. Thus *Payne* upholds a "weighing" circumstance which is broader and more diffuse than would be allowed for an eligibility circumstance. If the *Godfrey* standard applied, this Court "would not have decided *Payne* as [it] did." *Jones* v. *United States*, 527 U. S. 373, 401 (1999) (plurality opinion).

In *Barclay* v. *Florida*, 463 U. S. 939, 946 (1983), the trial judge considered Barclay's criminal record as an aggravating circumstance, even though Florida law does not permit this. Part II B of the plurality opinion addresses the question of whether Florida law could have permitted his criminal record to be considered. It holds that the principle of broad aggravating circumstances set forth in *Zant* v. *Stephens* applies equally to Florida. *Barclay*, *supra*, at 956.[7] "Criminal record" is a valid sentencing criterion, even though it is too vague to be a valid eligibility circumstance. Cf. *Zant*, 462 U. S., at 867-868. The *Barclay* concurrence, by the author of *Zant*, is in accord on this point. *Barclay*, *supra*, at 966-967, 969-970 (Stevens, J., concurring in the judgment).

As of 1991, then, the law seemed settled. Once the eligibility hurdle is cleared, the Constitution does not limit sentencers to considering aggravating factors which meet the specificity requirement of *Godfrey/Maynard*. This principle applies to all state systems, whether they instruct juries to "weigh," as in *Ramos*, *Payne*, and *Barclay*, or whether they do not, as in *Zant* v. *Stephens*.

F. Reconciling Stringer with Ramos.

The one flaw in this otherwise clear crystal is a single, citeless sentence in *Stringer* v. *Black*, 503 U. S., at 235: "A vague aggravating factor used in the weighing process is in a sense worse [than a vague eligibility factor], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."

This sentence could be misinterpreted to overrule the "myriad of factors" holding of *Ramos*. See *supra*, at 10-12. However, it could not mean that, because such a holding would have improperly created a new rule on habeas corpus. See

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7. The harmless error portion of *Barclay* is discussed *infra*, at 24-25.

Butler v. *McKellar*, 494 U. S. 407, 412 (1990) (overruling precedent is "new rule"). If it does not, then it must be reconciled with *Ramos*.

Stringer and *Ramos* cannot be distinguished on the ground that "future dangerousness" is somehow less vague than "especially heinous." As noted earlier, both factors ask the sentencer to place the crime or criminal on a continuum without objective markings. Furthermore, *Ramos*' "myriad of factors" discussion and extensive reliance on *Zant* v. *Stephens* preclude any distinction on this basis.

The two cases also cannot be distinguished on the ground of "weighing" versus "nonweighing." At the time *Ramos* was decided, the California system was *more* of a strict "weighing" process than the Mississippi system. Mississippi juries are told to further consider whether the aggravating circumstances are insufficient to warrant death despite their outweighing the mitigating, *Coleman* v. *State*, 378 So. 2d 640, 646-647 (Miss. 1979), while California juries at the time of *Ramos* were given no such instruction. See *Boyde* v. *California*, 494 U. S. 370, 373, n. 1 (1990) (quoting pre-1986 instruction).

The only distinctions which make a difference, then, are the breadth of factors considered on the aggravating side of the scale and the manner in which those factors are screened. In Mississippi, a statutory list is presented to the jury for unanimous findings of true or false. Only those "found to exist" are permitted to be considered. Miss. Code Ann. § 99-19-101(2)(c) (1992). In California, the jurors make no findings on the second-stage factors, and they need not agree on them. *People* v. *Cox*, 53 Cal. 3d 618, 692, 809 P. 2d 351, 395 (1991). Indeed, the factor of "circumstances of the crime," see Cal. Penal Code § 190.3(a), is not susceptible to a true or false answer.

This distinction is reinforced by *Stringer*'s description of the evil it sought to avoid: "the risk that the jury will treat the defendant as more deserving of the death penalty than he might

otherwise be by relying upon the *existence* of an *illusory* circumstance." *Stringer*, 503 U. S., at 235 (emphasis added). This creates a possibility of "randomness." *Id.*, at 236, Why is this a risk in Mississippi and not in California?

Suppose two defendants, A and B, are tried for similar murders. Both crimes are heinous. In Mississippi, both juries are asked to decide, yes or no, whether the crimes are "especially heinous." With no further guidance, A's jury may say yes and B's may say no, based on differences in the jurors' sensitivity rather than an actual difference in the crimes. The circumstance was "found to exist" in A's case but not B's. A's jury would therefore include heinousness on "death's side of the scale," and B's would be instructed not to. This is "randomness," causing A to be considered "more deserving of the death penalty" than B, for no valid reason.

In Georgia and California, this randomness is absent. Both juries will consider the heinousness of the crime. In Georgia, they do so because the final phase is open to all aggravating circumstances. In California, they do so because heinousness is a "circumstance of the offense." All murders are heinous, and the *degree* of heinousness is a proper consideration among the "myriad of factors" permitted under *Ramos*. There is no illusory circumstance. There is no randomness. Both juries give "weight" to the heinousness in the proportion they believe it deserves.

The difference is "the different role played by aggravating factors." *Stringer*, 503 U. S., at 232. In Florida and Mississippi the finding of truth of the eligibility factors is the exclusive getaway to the prosecution's case for penalty, while in Georgia and California, the eligibility factors do not play this role exclusively.

G. Tuilaepa and Jones.

This Court examined the California system again and reaffirmed *Ramos* in *Tuilaepa*, *supra*. California takes a middle

course to aggravating circumstances in the selection decision, broader than Florida's original limitation to the eligibility circumstances,[8] but not as broad as Georgia's wide-open rule. The aggravating circumstances, include the eligibility ("special") circumstances plus all the circumstances of the crime, previous violent crimes, and previous felony convictions. See Cal. Penal Code §§ 190.3(a), (b), (c). In some cases, the age of the defendant, § 190.3(i), could also be an aggravating factor. See *Tuilaepa*, 512 U. S., at 977. As in *Payne*, these circumstances would have failed the *Godfrey* standard if it applied. "Circumstances of the crime" is even more diffuse than the "outrageously vile" circumstance in *Godfrey*, and "criminal activity . . . which involved the use or attempted use of force or violence" is at least as vague as the "substantial history of serious assaultive criminal convictions" circumstance in *Zant* v. *Stephens*, 462 U. S., at 867. Unlike *Payne*, however, the argument "that selection factors must meet the requirements for eligibility factors" was made in *Tuilaepa*, 512 U. S., at 977, and the Court rejected it, relying primarily on *Gregg* and *Zant*. See *id.*, at 978-980.

The petitioners in *Tuilaepa* relied heavily on *Stringer*, and the Court distinguished *Stringer* this way:

> "In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (*e.g.*, whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *Stringer* v. *Black*, 503 U. S. 222 (1992). Those concerns are mitigated when a factor does not require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter. See Cal. Penal Code Ann. §§ 190.3(a), (k) (West 1988)." 512 U. S., at 974-975.

8. Florida now permits victim impact evidence for selection but not eligibility. See Fla. Stat. § 921.141(7).

This reconciliation of *Stringer* with *Ramos* is consistent with the analysis *amicus* has presented *supra*, at 17-19. The problem with the vague circumstance in *Stringer* was not the fact that the sentencer "weighed" it but rather the fact that the question of heinousness would be considered in a case or not based on the answer to a "specific proposition" that was too vague to provide any meaningful guidance. The randomness concern is mitigated when there is no "propositional" gateway, and the system allows the sentencer to consider the factor in every case where there is evidence to support it.

The federal system goes a step further than California in broadening the selection factors, although not quite as far as Georgia. The "statutory aggravating factors" for homicide, 18 U. S. C. § 3593(a); *Jones*, 527 U. S., at 377, serve the same function as California's "special circumstances." That is, at least one must be found for eligibility, and then they carry over into selection. See *Jones*, *supra*, at 377-378. In the selection decision, the jury can also consider other relevant "nonstatutory aggravating factors," but only those identified by the Government prior to trial. See *id.*, at 378, n. 2; 18 U. S. C. § 3592(c). In *Jones*, the nonstatutory aggravating factors in the kidnapping and murder of Tracie Joy McBride were her "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas" and her "personal characteristics and the effect of the instant offense on Tracie Joy McBride's family . . . ." 527 U. S., at 378, n. 3. There can be no doubt that the factors of background, personal characteristics, and effect of the crime on the family would not meet the standard for eligibility factors. These factors were not unconstitutionally overbroad in *Jones*, however, because the standard of overbreadth for a factor that "is important only for selection purposes" is different. See *id.*, at 401-402 (plurality opinion).

After *Tuilaepa* and *Jones*, it is no longer open to question that a jury may consider in the selection decision open-ended factors that would be too vague to serve as valid eligibility factors. This is true regardless of whether the jury is instructed to "weigh" aggravating and mitigating factors or given some other standard for decision.

III. The critical question is not whether the sentencer "weighs" but whether the substance of the stricken circumstance was proper to consider in the selection decision.

A. Zant v. *Stephens*.

In analyzing a contention that an invalid circumstance affected the selection process, "it is essential to keep in mind the sense in which that aggravating circumstance is 'invalid.' " *Zant* v. *Stephens*, 462 U. S 862, 885 (1983). Harmless error analysis requires an inquiry into whether the reason for a circumstance's invalidity for eligibility has any improper, harmful effect when it is considered for selection. That inquiry, in turn, requires an understanding of what properly goes into the selection decision in each jurisdiction's system. Simplistic labels such as "weighing State" will not do. As Justice Cardozo noted in *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934), "A fertile source of perversion in constitutional theory is the tyranny of labels."

In *Zant* v. *Stephens*, 462 U. S., at 866-867, the Georgia jury had found two aggravating circumstances: "a substantial history of serious assaultive convictions" and murder by an escaped inmate. As the Georgia Supreme Court subsequently explained, see *supra*, at 8-9, the aggravating circumstances as such are only used for the eligibility decision, while the selection decision is open to all relevant factors for both aggravation and mitigation. The state court overturned the first aggravating circumstance as impermissibly vague but affirmed the judgment. See *id.*, at 867-868. Under Georgia's wide-open

aggravation rule, prior convictions can be considered in the selection decision without limit. Therefore, "the evidence of respondent's prior convictions had been properly received and could properly be considered by the jury." *Id.*, at 873.

This Court distinguished the situation of aggravating circumstances which are too vague for eligibility from other kinds of "invalid" circumstances. This kind of circumstance is different from one that "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." *Id.*, at 885. This distinction anticipated *Dawson* v. *Delaware*, 503 U. S. 159, 167 (1992). The *Zant* Court also distinguished circumstances that were improperly counted as aggravating when they are irrelevant, discriminatory, or mitigating. 462 U. S., at 885. Finally, the Court distinguished the case of an aggravating circumstance based on inaccurate information. *Id.*, at 887, n. 24. This distinction anticipated *Johnson* v. *Mississippi*, 486 U. S. 578, 590, and n. 9 (1988), where the evidence "ha[d] been revealed to be materially inaccurate" when a prior conviction used as an aggravating circumstance was set aside.

Zant "involve[d] a statutory aggravating circumstance, invalidated by the State Supreme Court on grounds of vagueness, whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged." 462 U. S., at 887. Under these circumstances, the only thing that was before the jury in its selection decision that did not belong there was "the statutory label 'aggravating circumstance.' " *Id.*, at 888. There was no "thumb [improperly] on death's side of the scale," cf. *Tuilaepa* v. *California*, 512 U. S. 967, 986 (1994) (Blackmun, J., dissenting), but only a cellophane wrapper. The *contents* of the wrapper were *properly* "on death's side of the scale." *Zant* held that "it is not constitutional error for the trial judge to place an incorrect label the prosecutor's evidence . . . ." *Id.*, at 983 (Stevens, J., concurring in the judgment).

B. The "Weighing State" Cases.

In footnote 12, *Zant* v. *Stephens*, 462 U. S., at 873-874, distinguished the decisions of courts of four states that set aside death sentences upon a finding of one invalid aggravating circumstance.

> "[I]n each of these States, not only must the jury find at least one aggravating circumstance in order to have the power to impose the death sentence; in addition, the law requires the jury to weigh *the* aggravating circumstance against the mitigating circumstances when it decides whether or not the death penalty should be imposed. See Ark. Stat. Ann. § 41-1302(1) (1977); N. C. Gen. Stat. § 15A-2000(b) (1978); Tenn. Code Ann. § 39-2-203(g) (1982); Wyo. Stat. § 6-2-102(d)(i) (1983)." (Emphasis added).

The *Zant* Court referred back to this footnote in reserving judgment on whether its rule applied to such a statute. See 462 U. S., at 890.

Every one of the statutes cited not only required "weighing" but also limited the aggravating circumstances in the selection decision to the same list used for eligibility. The conflation of these two distinct aspects of death penalty statutes has confused the issue ever since. See, *e.g.*, *Williams* v. *Calderon*, 52 F. 3d 1465, 1478, and n. 13 (CA9 1995) (en banc) (noting split of authority when statute has only one of these features).

Two weeks after *Zant*, *Barclay* v. *Florida*, 463 U. S. 939 (1983) addressed harmless error analysis in a state where the sentencer "weighs" and aggravating selection circumstances are limited to the eligibility circumstances. See *id.*, at 954 (plurality opinion). The judge considered a nonstatutory aggravating circumstance that was improper under state law, even though it would have been constitutional to consider the eligibility decision. See *id.*, at 956. The error was harmless given the presence of valid aggravating circumstances and absence of any mitigating circumstances. See *id.*, at 955, 958; see also *id.*, at

967-968 (Stevens, J., concurring in the judgment). This is, in effect, "reweighing," in that the appellate court determines that anything outweighs nothing.

In *Maynard* v. *Cartwright*, 486 U. S. 356, 365 (1988), a death sentence was overturned without harmless error analysis when one of the aggravating circumstances was found insufficient under *Godfrey*. This holding was based on state practice, see *ibid.*, and not on the characteristics of the state's capital sentencing system.

The term "weighing State" makes its debut in *Clemons* v. *Mississippi*, 494 U. S. 738, 749 (1990). The *Clemons* Court distinguished the Mississippi system from the Georgia system by both the continued role of the eligibility factors in the selection decision and the fact that the sentencer weighs "any mitigation factors against the aggravating circumstances." *Id.*, at 745. A footnote at that point quotes the statute, which limits the aggravating selection factors to the same list used for eligibility. Under this system, an aggravating circumstance that is too vague might be salvaged by harmless error analysis, *i.e.*, a finding that the jury would have found it if it had been properly narrowed. See *id.*, at 751. Otherwise, the defendant is entitled to a reweighing of the "mix" without that circumstance. *Id.*, at 752.

Parker v. *Dugger*, 498 U. S. 308, 318-319 (1991) gives us this definition of a "weighing State": "the death penalty may be imposed only where *specified* aggravating circumstances outweigh all mitigating circumstances. Fla. Stat. § 921.141(3) (1985); *McCampbell*, 421 So. 2d, at 1075; *Jacobs*, 396 So. 2d, at 718." (Emphasis added). The citations are significant here. *McCampbell* v. *State*, 421 So. 2d 1072, 1075 (Fla. 1982) (*per curiam*) holds on the cited page that it is error for the sentencer to consider in the selection decision any aggravating factor not on the statutory list. It says nothing about the process being a "weighing" process as opposed to some other kind. *Jacobs* v. *State*, 396 So. 2d 713, 718 (Fla. 1981) holds on the cited page that the sentencer must consider nonstatutory mitigating factors.

Stringer v. *Black*, 503 U. S. 222, 229-230 (1992) defines "weighing States" with reference to the factors considered in the selection decision, distinguishing the Georgia system in *Zant* on the ground that the sentencer there " ' "takes into consideration *all* circumstances before it." ' " (Quoting *Zant*, quoting in turn Georgia Supreme Court's response, emphasis added). In later cases, though, we see the label "weighing State" take on a life of its own, divorced from the reason why this type of harmless error analysis is different in Georgia-type systems than it is in Florida-type systems. *Espinosa* v. *Florida*, 505 U. S. 1079, 1081 (1992) refers to "a State where the sentencer weighs . . ." as the defining criterion. See also *Sochor* v. *Florida*, 504 U. S. 527, 532 (1992).

Richmond v. *Lewis*, 506 U. S. 40 (1992) strays the furthest afield, possibly because Arizona did not contest its "weighing State" status. See *id.*, at 47. The statute in Arizona at the time required the court to "take into account the aggravating and mitigating circumstances . . . ." *Ibid.* (quoting Ariz. Rev. Stat. Ann. § 13-703(E) (1989)). *Richmond* held that this statute required the aggravating and mitigating circumstances to be considered against each other, and hence weighed. See *id.*, at 47-48. It does, but after *Lockett* and certainly after *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), all sentencers must weigh. As discussed *supra*, at 15-17, the only intelligible way to consider mitigating circumstances is to consider them in the context of opposing aggravating circumstances.

The Georgia system in *Zant* is the exemplar of a "nonweighing State," yet the jury in that case was instructed to " 'consider all facts and circumstances in extinuation [sic], mitigation and aggravation of punishment . . . .' " *Zant* v. *Stephens*, 456 U. S. 410, 411, n. 1 (1982). The difference, if any, between the decision process in *Zant* and the one in *Richmond* is too thin to support any major difference in harmless error analysis. Arizona judges who "take into account the aggravating and mitigating circumstances" are not engaged in a different mental process from that of Georgia juries who

"consider all facts and circumstances in . . . mitigation and aggravation . . . ." The key difference between the Georgia and Arizona systems lies in what the sentencer considers, not how. That is also the key similarity between Arizona and Florida.

"There is a simple and logical difference between rules that govern *what factors* the jury must be permitted to consider in making its sentencing decision and rules that govern *how* the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990) (emphasis added). Florida and Georgia differ on both these points, but the label "weighing State" seizes on the wrong one. The Third Circuit rejected the tyranny of labels in *Flamer* v. *Delaware*, 68 F. 3d 736, 749 (1995) (en banc). The fact that Delaware permitted consideration of all relevant aggravating facts made the *Zant* v. *Stephens* rule applicable, despite the fact that the statute instructs the sentencer to "weigh." The Illinois Supreme Court came to the same conclusion on a similar statute in *People* v. *Pasch*, 604 N. E. 2d 294, 317 (1992). Unfortunately, this Court's review and resolution of the issue was blocked by the defendant's death and resulting mootness. See *Pasch* v. *Illinois*, 510 U. S. 910, 910-911 (1993).

The label "weighing State" is misleading and should be abandoned. The question under *Zant* v. *Stephens* is whether the substance of the stricken eligibility circumstance was nonetheless properly considered in the sentencer's selection decision.

IV. The California Supreme Court correctly applied *Zant* v. *Stephens* to this case.

The California Supreme Court does not have a rule of automatic affirmance in cases where a special circumstance has been held invalid but valid circumstances remain. Cf. *Clemons* v. *Mississippi*, 494 U. S. 738, 752 (1990). Instead, the court examines each case on its facts. The most important element in these examinations is whether the premise of the *Zant* v.

Stephens, 462 U. S. 862 (1983) rule is true. That is, were the facts underlying the stricken circumstance proper subjects for consideration by the jury in the selection phase, so that nothing but a statutory label was wrongly added to what was rightly on the aggravating side of the scale?

In *People* v. *Wade*, 44 Cal. 3d 975, 998, 750 P. 2d 794, 807 (1988), the jury had found both "a 'heinous' murder and a 'torture' murder." As noted *supra*, at 7, n. 3, these two special circumstance are largely redundant. The California Supreme Court held that evidence supporting the stricken circumstance was equally admissible for the valid one, and that it was also proper to consider the evidence as "circumstances of the crime." See *ibid.* Because nothing but the label was improper, *Zant* v. *Stephens* applied.

The present case is similar. Defendant argued that all four special circumstances were invalid, but the court *sua sponte* also considered whether the finding of two valid and two invalid circumstances was prejudicial. See *People* v. *Sanders*, 51 Cal. 3d 471, 520, 797 P. 2d 561, 589 (1990). With regard to the heinous murder circumstance, the court noted that the prosecutor did not emphasize the finding it was especially heinous, see *id.*, at 521, 797 P. 2d, at 590, what this Court would later call its "propositional" content. See *supra*, at 20. Instead, the emphasis was on the circumstances of the crime, under which the same facts were admissible and proper subjects for consideration in the selection decision. Similarly, for the technically invalid burglary circumstance, its facts were essentially the same as the proper robbery circumstance. See *ibid.* They are also circumstances of the crime.

The Court of Appeals in this case criticized the California Supreme Court for not using the term "harmless error" or expressly citing the "beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U. S. 18 (1967). See *Sanders* v. *Woodford*, 373 F. 3d 1054, 1064 (CA9 2004). *Zant* v. *Stephens* does not use these terms, either. *Zant* is based on separate consideration of the eligibility and selection decisions. The

jury's finding of a vague but superfluous circumstance at the eligibility decision does not violate any constitutional right of the defendant, because he has been placed into the narrowed, death-eligible class by other, valid findings. When nothing but a label carries forward to the selection decision, and the substance of the vague circumstance is properly considered anyway, *Zant* holds that "any possible impact [of the label] cannot fairly be regarded as a constitutional defect in the sentencing process." 462 U. S., at 889.

Arguably, at least, *Zant* is not a case of harmless error but rather a case where there was no federal constitutional error at all. Alternatively, it could be taken as defining a set of cases where the error is *per se* harmless. Either way, there is no need to recite the *Chapman* litany.

The Court of Appeals in this case held that the California Supreme Court's invocation of *Zant* was error, because the Court of Appeals concluded that California is a "weighing State" to which *Zant* does not apply. See *Sanders*, 373 F. 3d, at 1064. This premise was based on a belief that nonweighing States are limited to those where the scope of aggravating factors at the selection decision is "boundless." See *id.*, at 1062. As we have explained, this narrow interpretation of *Zant* is erroneous.

In the present case, as in every case where it applies *Zant*, the California Supreme Court examined the evidence supporting the stricken special circumstance to see that it was admissible and that the facts were proper subjects for consideration under a valid special circumstance, a nonpropositional aggravating circumstance, or both. Where this condition is met, the rule of *Zant* applies, and there has been "no constitutional defect in the sentencing process." 462 U. S., at 889.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed and the sentence of death reinstated.

June, 2005

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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No. 04-980

Supreme Court, U.S.
FILED
JUN 2 - 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 11, 2005
CERTIORARI GRANTED MARCH 28, 2005

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 3, 1982	Judgment of death imposed by California Superior Court for Kern County
September 27, 1990	Conviction and sentence affirmed by California Supreme Court on automatic appeal
May 28, 1991	Sanders' petition for writ of certiorari on direct appeal denied
July 13, 1992	Sanders' original, pro per, petition for a writ of habeas corpus filed in United States District Court for the Eastern District of California
November 7, 1994	Sanders' petition for writ of habeas corpus filed in the California Supreme Court
September 1, 1999	Petition for writ of habeas corpus denied by the California Supreme Court
August 28, 2001	United States District Court for the Eastern District of California denied Sanders' petition for writ of habeas corpus
July 8, 2004	United States Court of Appeals for the Ninth Circuit issued opinion on appeal from denial of habeas corpus, ordering conviction affirmed but penalty reversed

October 13, 2004	United States Court of Appeals for the Ninth Circuit denied California's petition for rehearing en banc
January 11, 2005	California's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed
March 28, 2005	California's petition for writ of certiorari granted by the United States Supreme Court

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ronald L. Sanders, *Petitioner-Appellant*, v. Jeanne S. Woodford, Warden, of California State Prison at San Quentin, *Respondent-Appellee*.	No. 01-99017 D.C. No. CV-92-05471-REC-P OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior Judge, Presiding

Argued ad Submitted
February 12, 2005--Seattle, Washington

Filed July 8, 2004

Before: Dorothy W. Nelson, Andrew J. Kleinfeld and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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Jane N. Kirkland, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

FISHER, Circuit Judge:

Convicted of murder and sentenced to death, Ronald Sanders appeals the district court's denial of his federal habeas petition, challenging both his conviction and his death sentence. We hold that the district court correctly rejected Sanders' claim that the jury that convicted him was drawn from a jury venire that unconstitutionally failed to reflect the number of Hispanics in Kern County, where he was tried. We conclude, however, that Sanders did not receive an individualized death sentence, as required by the Eighth Amendment. The California Supreme Court neither independently reweighed aggravating and mitigating sentencing factors after it had invalidated two of the aggravating factors, nor did it conduct an appropriate harmless-error analysis. We also conclude that this error was not harmless. We therefore reverse the district court's denial of Sanders' habeas petition as it relates to the imposition of the death penalty and remand with instructions to grant the petition if the state does not either provide a new penalty trial or replace the sentence of death with another legally appropriate punishment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Sanders was found guilty of murdering of Janice Allen. According to the state, the murder arose out of an escalating dispute between Allen's boyfriend, Dale Boender, who was a drug dealer, and two of Boender's customers, Brenda Maxwell and her aunt Donna Thompson.

In 1980, Boender dealt cocaine around Bakersfield, California. Maxwell was one of his customers, as was Thompson. Boender had stopped selling cocaine to Maxwell because she owed him money. As for her aunt, she felt that Boender had "burned her" in a drug transaction. So — as Maxwell testified — she, Thompson, and Sanders hatched a plan to rob Boender and steal his cocaine. The plan was to lure Boender to Maxwell's home, have Sanders — whom Boender did not know — attack and rob Boender, and then have Sanders bind and "rob" Maxwell to make her look innocent of the set-up. Thompson would later "discover" and free both Boender and Maxwell.

On the morning of January 21, 1981, Maxwell called Boender, asking him to come to her house with a large amount of cocaine. Boender went to Maxwell's home accompanied by Allen. Upon arriving, Boender was attacked with a piece of a pool cue by a man whom he had never seen before, but whom Boender later identified as Ronald Sanders. The robbery, however, did not go according to plan. Boender gained the upper hand over Sanders and left with the drugs. By that time, Allen had already fled the scene.

Immediately after the botched robbery, Maxwell feared that Boender would realize he had been set up, and (according to

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1. We take our factual statements from the California Supreme Court's opinion in *People v. Sanders*, 51 Cal. 3d 471 (1990).

Maxwell) Sanders also feared Boender could identify him. Maxwell, Thompson and Sanders went by the house of another person, John Cebreros, to enlist his help. The group then went to Thompson's house, where Maxwell called mutual friends of hers and Boender's to tell them she had been robbed and raped so as to enhance her claim that she had been victimized along with Boender.

The next Friday evening, after drinking wine and smoking marijuana with friends, Boender and Allen bought groceries and returned to their apartment. While they were preparing dinner, there was a knock at the door. Leaving Allen in the kitchen, Boender went to the front door and opened it, encountering Sanders and a man he later identified as Cebreros (whom Boender had not seen before). Sanders spun Boender around and pushed him to the floor, face down. Allen emerged from the kitchen and was also made to lie on the floor. Boender's glasses were ripped from hi face and both he and Allen were bound and blindfolded.

Boender testified that the assailants asked for his cocaine and his money. He heard the assailants rummaging around his apartment. One of the assailants dragged him to what seemed like his bedroom and left the room. He heard more footsteps, muffled talking and more banging around the apartment. Boender heard one of the assailants say that he wanted to leave, but heard the other say that he wanted to stay. Boender could not identify the speaker who wanted to leave. Boender then heard someone approach, felt a blow to the head and recalled nothing further.

Later that night, Boender's roommates returned to the apartment and found it full of smoke from a pot left on the stove. They discovered Boender in his bedroom, lying in a pool of blood. After calling an ambulance, they noticed that the apartment was in disarray, there were spots of blood around and

a bag of marijuana was missing. One roommate found Allen's body in another bedroom and called the police.

Both Boender and Allen had been bound by lengths of electrical cord cut from a vacuum cleaner. Allen sustained a fatal head wound from a heavy, blunt object which fractured her skull and lacerated her brain. Boender suffered a skull fracture but was conscious when the police arrived. Maxwell, Sanders and Cebreros were originally arrested, but Maxwell was released and granted immunity in return for her testimony.

Sanders and Cebreros were tried jointly. As the state acknowledged at trial, there was no direct evidence that determined whether Sanders or Cebreros had killed Allen. The most important witnesses for the prosecution were Boender and Maxwell; Boender identified Sanders from the robbery and Maxwell implicated Sanders in the plot to rob or murder Boender.

The defendants challenged Boender's identification and presented an alibi defense. Three defense witnesses testified that on the night of the murder, both Sanders and Cebreros were at the home of Cebreros' brother, Salvador, talking, playing chess and drinking beer. No physical evidence was found at the murder scene to link Sanders or Cebreros to the murder.

The first trial of the co-defendants resulted in a hung jury. On January 22, 1982, after a retrial, both Sanders and Cebreros were convicted of robbery, burglary, attempted murder of Boender and first degree murder for the death of Allen. For both defendants, the jury found to be true four of the "special circumstances" that are necessary under California law for the imposition of the death penalty after a murder conviction.

At the penalty phase, for reasons that are unclear from the record, the prosecution waived its right to seek the death penalty

for Cebreros but decided to seek death for Sanders. Sanders instructed his counsel that he did not want to present any evidence or argument at the penalty phase, because (as he told the trial court at the time) he felt that both life in prison and death were "equally unacceptable" sentences. Apparently because of these instructions, Sanders' counsel did not pursue a thorough investigation into potential mitigating evidence. He presented no evidence of mitigating circumstances and gave no argument whatsoever to the jury at the penalty phase.

The state argued only one aggravating circumstance to the jury at the penalty phase — namely, that Sanders had committed five armed robberies in Orange County, California, in 1970, to which several witnesses testified. Sanders had been convicted for these robberies, pled guilty, served time in state prison and, in 1973, was granted parole, from which he had been removed in 1980. After hearing the prosecution's penalty evidence and argument, the jury returned a verdict of death after deliberating for about two hours over two days.

As discussed in more detail below, on automatic appeal, the California Supreme Court invalidated two of the four special circumstances found by the jury in convicting Sanders. The California Supreme Court upheld the conviction and sentence in all other respects, and the United States Supreme Court denied certiorari.

On December 20, 1993, Sanders filed his first federal petition for a writ of habeas corpus in the district court. The district court ordered Sanders to exhaust state remedies, which he proceeded to do. Sanders then filed an amended petition in the district court, which denied the petition in its entirety on August 24, 2001. We granted Sanders a certificate of appealability on several of his claims on July 30, 2002.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over Sanders' habeas petition under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 1291. Because Sanders filed his habeas petition before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996, AEDPA does not apply. *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003). The district court's decision to deny relief is reviewed de novo. *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Factual findings made by the district court are reviewed for clear error. *Alcala*, 334 F.3d at 868.

DISCUSSION

We first address Sanders' challenge to the imposition of the death penalty, and then discuss his challenge to his conviction.

I. Sentencing Error

[1] In assessing whether a death sentence satisfies the Eighth Amendment's prohibition on cruel and unusual punishment, a "primary concern . . . has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990). "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

[2] A serious concern about whether a death sentence is truly individualized arises when a jury decides to impose a death sentence based on its own assessment of aggravating and

mitigating factors, and an appellate court later declares some or all of those aggravating factors legally invalid. Later invalidation of aggravating factors may undermine a jury's original calculus for imposing death, introducing the risk that a defendant in such cases will not receive "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 494 U.S. at 752; *see also Stringer v. Black*, 503 U.S. 222, 230-31 (1992). Moreover, "[e]mploying an invalid aggravating factor in the weighing process creates the possibility of randomness, by placing a thumb on death's side of the scale, thus creating the risk of treating the defendant as more deserving of the death penalty." *Sochor v. Florida*, 504U.S. 527, 532 (1992) (internal quotation marks, citations and alterations omitted).

[3] The Supreme Court has set out clear rules for the procedures appellate courts must follow when an aggravating factor has been held invalid. *See id.* at 532. The procedures differ significantly between so-called "weighing" and "nonweighing" states. In nonweighing states, aggravating factors matter for determining eligibility for the death sentence, but have no specific function in the sentencing process itself. At sentencing in nonweighing states, the fact finder always takes into consideration all circumstances from both the guilt and the sentencing phases of the trial. *See Stringer*, 503 U.S. at 229-230. Thus, in these states, as long as the jury finds that at least one aggravating factor makes the defendant death-eligible, the subsequent elimination of another aggravating factor does not pose a problem for individualized sentencing, because the aggravating circumstances are not considered as separate factors in sentencing. *See Zant v. Stephens*, 462 U.S. 862, 889 (1983); *Williams v. Calderon*, 52 F.3d 1465, 1479 (9th Cir.1995) (holding that California's pre-1978 death penalty system was nonweighing).

[4] In contrast, in weighing states — including, as we explain below, California after 1978 — "the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances." *Clemons*, 494 U.S. at 745. In these states, "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." *Sochor*, 504 U.S. at 532.

A remand for resentencing is not necessarily required, however, in order to correct this error. In weighing states, when a jury has made the sentencing determination, state appellate courts that have declared an aggravating factor invalid in a capital case have three options. They may either: (1) remand for resentencing; (2) independently reweigh the remaining aggravating and mitigating circumstances under the procedure set forth in *Clemons*, in which the "state appellate court reweighs aggravating and mitigating circumstances that have already been found by a jury to exist," *Valerio v. Crawford*, 306 F.3d 742, 757 (9th Cir. 2002) (en banc); or (3) independently conclude that the sentencing body's consideration of the invalid aggravating circumstance was "harmless beyond a reasonable doubt" under the standard elaborated in *Chapman v. California*, 386 U.S. 18, 23 (1967). *See Morales v. Woodford*, 336 F.3d 1136, 1147 (9th Cir. 2003). "While federal law does not require the state appellate court . . . to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error." *Sochor*, 504U.S. at 532.[2]

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2. In *Valerio* we concluded that another method of appellate curing of unconstitutional error in sentencing instruction — the combination of a narrowing construction of the improper instruction and de novo appellate review described in *Walton v. Arizona*, 497 U.S. 639 (1990) — is not available when the penalty phase fact finder is a jury. 306 F.3d at 758.

Even if a state appellate court has not adhered to these principles and thus failed to ensure constitutionally adequate sentencing, such an error does not automatically mean that a petitioner will receive habeas relief in federal court. Rather, in habeas cases, we apply a second level of harmless-error review in order to determine whether the state court's failure to conduct the constitutionally mandated review was itself harmless. *See Morales*, 336 F.3d at 1148. In doing so, we apply the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), which requires us to determine whether, in light of the record as a whole, the error had substantial and injurious effect or influence in determining the jury's verdict. *Morales*, 336 F.3d at 1148.

In Sanders' case, the California Supreme Court invalidated two of the "special circumstances" that the jury had found at the guilt phase and was required to weigh in deciding whether to impose a death sentence. *See* Cal. Penal Code 190.3(a) (West 2003) (stating that a sentencing jury shall take into consideration if relevant "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to [Cal. Penal Code] Section 190.1"). Sanders claims that he is entitled to relief because after invalidating these two special circumstances, the California Supreme Court neither remanded for resentencing nor conducted an independent reweighing or a proper harmless-error analysis. For Sanders to prevail on this claim, he must demonstrate (1) that California is a weighing state; (2) that the California Supreme Court did not conduct a proper review; and (3) that the failure to conduct such a review, in light of the record as a whole, had a substantial and injurious effect on his sentencing. We hold that Sanders has met all three of these requirements.

A. California's Death Sentencing System

We have indicated that California's post-1978 death penalty law created a "weighing" system. *See Allen v. Woodford*, 366 F.3d 823, 857 (9th Cir. 2004). We have not, however, explained precisely how the weighing of sentencing factors operates under California law. Because specific features of California law are important to our ruling here, we shall do so now.

We consider a state death penalty regime to be a weighing system when "the sentencer [is] restricted to a 'weighing' of aggravation against mitigation" and "the sentencer [is] prevented from considering evidence in aggravation other than discrete, statutorily-defined factors." *Williams v. Calderon*, 52 F.3d 1465, 1477 (9th Cir. 1995).[3] Both of these elements are present under California's post-1978 system. California Penal Code § 190.3 specifies that the sentencing jury in a capital case "shall take into account . . . if relevant" any of 11 factors. The trier of fact "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." Cal. Penal Code § 190.3. The California Supreme Court has expressly interpreted § 109.3 as precluding the jury from considering aggravating factors other than those statutorily defined. *People v. Boyd*, 38 Cal. 3d 762, 773 (1985) ("By . . . requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the [post-1978 death penalty law] necessarily implie[s] that matters

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3. We note that *mitigating* evidence, unlike aggravating evidence, *may not* be confined to discrete, statutorily defined factors, because "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *see also Belmontes v. Woodford*, 350F.3d 861, 898 (9th Cir. 2003) (interpreting California Penal Code § 190.3(k) as satisfying this requirement within California's death penalty scheme).

not within the statutory list are not entitled to any weight in the penalty determination."). Thus, as we have previously indicated, it is clear that California's post-1978 death penalty system is a weighing system. *See Allen*, 366 F.3d at 857.

We note, however, that California's system has features that are not present in all weighing states, and that are important for understanding the effect of the invalidation of the special circumstances in Sanders' case. A death penalty trial in California proceeds in two stages. At the initial phase of the trial, when the trier of fact decides the issue of the defendant's guilt or innocence, "a determination must be made as to the existence of any 'special circumstances.' " *People v. Bacigalupo*, 6 Cal. 4th 457, 467 (1993). Special circumstances found at the guilt phase serve to make a defendant eligible for the death penalty, and are thus the "criteria in the California capital scheme that define the class of murders for which death is a potential penalty." *Id.* at 467-68. The weighing of factors under § 190.3 becomes relevant only at a subsequent "penalty" or sentencing phase that occurs once the defendant has been found death-eligible during the guilt phase.

> At this stage in the proceedings, additional evidence may be offered and the jury is given a list of relevant factors . . . to guide it in deciding whether to impose a sentence of life without the possibility of parole or a sentence of death. . . .
>
> With the exception of section 190.3's factor (k), which invites consideration of any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, the statute does not explicitly designate any of the factors as exclusively aggravating or exclusively mitigating. It simply directs the trier of fact to aspects of the offense and the defendant's background that are relevant to the penalty determination.

Id. at 814 (internal citation, quotation marks and alterations omitted). Although the statute plainly instructs that the fact finder "shall" at this stage impose death if it finds that the aggravating circumstances outweigh the mitigating ones, "[t]his weighing is a process that by nature is incapable of precise description." *Id.* at 470 (internal quotation marks omitted); *see also People v. Brown*, 40 Cal. 3d 512, 541-45 (1983), *reversed on other grounds by California v. Brown*, 479 U.S. 538 (1987).

> The weighing of aggravating against mitigating circumstances is a mental balancing process, but not one that involves a mechanical counting of factors on either side of some imaginary scale, or the arbitrary assignment of weights to any factor. Rather . . . a juror faced with making the requisite individualized determination whether a defendant should be sentenced to life without parole or to death is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to each and all of the relevant factors.

Bacigalupo, 6 Cal. 4th at 470 (internal quotation marks and citations omitted); *see also Allen*, 366 F.3d at 855.

Thus, under California law, when a jury decides whether to impose the death penalty, it does more than merely count aggravating and mitigating factors, and individual jurors may ascribe varying weight to any single aggravating factor. This makes it difficult for an appellate court that later reviews the jury's sentencing decision to surmise what weight the jury gave to a particular factor.

Nonetheless, California still qualifies as a weighing state, because the jury's sentencing discretion is not boundless — it must consider the defined list of aggravating factors, and may not consider other aggravating factors, in making its penalty determination. Therefore, an appellate court's invalidation of

one or more of the sentencing factors may have a serious effect on individualized sentencing, because there is a real risk that the jury's decision to impose the death penalty rather than life imprisonment may have turned on the weight it gave to an invalid aggravating factor. With this sentencing structure in mind, we turn to the California Supreme Court's affirmance of Sanders' death sentence in light of its invalidation of two of the aggravating factors the jury considered.

B. The California Supreme Court's Affirmance of the Death Sentence

The jury found to be true four special circumstance allegations against Sanders: (1) that the murder was committed while he was engaged in a robbery (*see* Cal. Penal Code § 190.2(a)(17)(A)); (2) that it was committed while he was engaged in a burglary (§ 190.2(a)(17)(G)); (3) that Allen was killed to prevent her testimony (§ 190.2(a)(10)); and (4) that the murder was heinous, atrocious and cruel (§ 190.2(a)(14)). *People v. Sanders*, 51 Cal. 3d 471, 515 (1990). The California Supreme Court invalidated the burglary special circumstance because the jury could have found the requisite mental state for burglary based on Sanders' intention to commit assault, not a murder, and then have impermissibly merged the burglary with the murder to create the burglary-murder special circumstance. *Id.* at 517; *see also People v. Wilson*, 1 Cal. 3d 431, 441 (1969) (rejecting "bootstrapping" of burglary and felony-murder). The court also set aside the heinous-murder special circumstance because in a prior opinion it had found that special circumstance to be unconstitutionally vague. *Sanders*, 51 Cal. 3d at 520; *see People v. Superior Court (Engert)*, 31 Cal. 3d 797 (1982).

The California Supreme Court issued its decision shortly after the United States Supreme Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and before the Court's decision in *Stringer v. Black*, 503 U.S. 222, 230 (1992). Thus,

perhaps understandably, the California court did not follow the procedures constitutionally mandated for appellate review in a weighing state where an aggravating circumstance has been invalidated. The California court did not remand for resentencing. It also did not independently reweigh the aggravating and mitigating factors to ensure an individualized sentence. The state does not argue otherwise.

Although the California court did apparently conduct some type of harmless-error analysis, it did not find, as it was required to do, that the error was "harmless beyond a reasonable doubt." *See Morales*, 336 F.3d at 1147-48. The court first focused on the heinous-murder special circumstance and its effect on the jury in light of the prosecutor's closing argument. The court observed, "Although the prosecutor mentioned the heinous-murder special circumstance in closing argument, he did not heavily rely on it." *Sanders*, 51 Cal. 3d at 521. It concluded, "[A] reasonable juror would not have been swayed by abstract concepts of heinous, atrocious or cruel . . . but would instead have focused on the actual circumstances of the offense which formed the foundation for finding those special circumstances to be true." *Id.* (internal quotation marks and alterations omitted). Then, the court turned to the burglary-murder special circumstance, noting that "the prosecutor did not focus on the bare number of special circumstance findings but urged the jury to consider the brutality of the crimes." *Id.* It determined that "there was little chance defendant was prejudiced by consideration of the burglary-murder special circumstance." *Id.*

[5] We cannot uphold a state appellate court's harmless error review as adequate when we have substantial uncertainty about whether the state court actually concluded that the invalid aggravating factor was harmless beyond a reasonable doubt. In *Sochor v. Florida*, 504 U.S. 527 (1992), a state trial court in Florida had found four aggravating circumstances and no

circumstances in mitigation.[4] *Id.* at 530. The Supreme Court of Florida invalidated one of the aggravating circumstances — the "cold, calculated, and premeditated manner" circumstance — because this factor required a "heightened" degree of premeditation that was not supported by the evidence in the case. *See id.* at 531. Despite the error, the Florida court affirmed the death sentence and said:

> The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991). The United States Supreme Court concluded that the Supreme Court of Florida had not adequately performed a harmless-error review. The Court noted that the state court failed "so much as to mention 'harmless error.' " *Sochor*, 504 U.S. at 539-40. It also pointed out that "[o]nly one of the four cases [cited by the Florida court] contains language giving an explicit indication that the State Supreme Court had performed harmless error analysis. The other three simply do not, and the result is ambiguity." *Id.* at 540 (citation omitted). The Court thus held, "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error 'was harmless beyond a reasonable doubt' in that 'it did not contribute to the [sentence] obtained, *Chapman*, [386 U.S. at 24,] the error cannot be taken as cured by the State Supreme Court's consideration of the case." *Sochor*, 504 U.S. at 540.

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4. In Florida, the weighing is done by a judge with an advisory jury verdict. *See Sochor*, 504 U.S. at 529-30.

[6] The California Supreme Court's review in this case is similar to the Florida Supreme Court's review in *Sochor*. The California court never used the words "harmless error" or "reasonable doubt" in analyzing the effect of removing the special circumstance. Moreover, it appears that the California court erroneously believed that it could apply the rule of *Zant v. Stephens*, 462 U.S. 862 (1983) — which is applicable only to nonweighing states — and uphold the verdict despite the invalidation of two special circumstances because it was upholding other special circumstances. *See Sanders*, 51 Cal.3d at 520 ("The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors [citing *Zant*], and this court is in accord."). In these circumstances, we cannot conclude that the California Supreme Court found that the invalidation of the special circumstance was harmless beyond a reasonable doubt. *See Clemons*, 494 U.S. at 754 ("It is perhaps possible . . . that the Mississippi Supreme Court intended to ask whether beyond a reasonable doubt the result would have been the same . . . . Because we cannot be sure which course was followed in Clemons' case, however, we vacate the judgment insofar as it rested on harmless error . . . ."). We therefore hold that Sanders did not receive the individualized death sentence to which he was entitled because the California Supreme Court did not conduct an adequate, independent appellate review.

C. Substantial and Injurious Effect

[7] Before Sanders is entitled to habeas relief, however, we must also apply our own harmless-error analysis to determine whether the Eighth Amendment error had a substantial and injurious effect or influence on the jury's verdict. "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless. And, the petitioner must win." *O'Neal v.*

McAninch, 513 U.S. 432, 436 (1995) (internal quotation marks omitted).

Morales v. Woodford, 336 F.3d 1136 (9th Cir. 2003), another federal habeas case involving California's post-1978 death-penalty law, provides a point of contrast. In that case, applying *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), we found harmless an invalid special circumstance weighed by the jury in the penalty phase, where the jury also relied on another valid special circumstance in deciding to impose the death penalty. The invalid special circumstance required the jury to find that "the murder involved the infliction of torture" (defined as "the infliction of extreme pain"). *Morales*, 336 F.3d at 1145 & n.20 (internal quotation marks omitted). However, the special circumstance did not require the jury to find that the defendant intentionally tortured the victim. *Id.* Applying our prior case law, we held that special circumstance constitutionally invalid because the unintentional infliction of extreme pain might "have nothing to do with the mental state or culpability of the defendant and would not seem to provide a principled basis for distinguishing capital murder from any other murder." *Id.* at 1146; *see also Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir. 1994) (invalidating this special circumstance), *overruled on other grounds*, *Rohan* ex rel. *Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003).

Despite this legal conclusion, we noted that the facts strongly suggested that the defendant had tortured the victim and that he had done so intentionally. "There [was] no reason to doubt that after [the defendant] failed to kill [the victim] by strangling her with [a] belt, he beat her head in with a hammer, and when she still lived, dragged her out of the car, raped her, and stabbed her several times." *Morales*, 336 F.3d at 1149. Given this "overwhelming" evidence, the jury would have reached the unavoidable conclusion that the defendant intended to inflict extreme pain on the victim as part of the murder. *Id.* Because

we did not doubt in *Morales* that the jury in fact *did* find that the defendant intended to torture the victim, we concluded that the constitutional error had no substantial or injurious effect on the defendant's sentencing.

[8] Here, in contrast, the jury likely considered the legally improper aspects of the invalid special circumstances. The jury could well have relied on the vague language in the heinous-murder instruction in finding the murder "heinous, atrocious, and cruel." The facts do nothing to cure the problem with this special circumstance, because the terms of that circumstance are " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *People v. Superior Court (Engert)* 31 Cal. 3d 797, 801 (1982) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

[9] The jury also easily could have considered the improper aspect of the burglary-murder special circumstance. According to the California Supreme Court, the flaw in the burglary murder special circumstance was that the trial court's felony murder jury instructions during the guilt phase had "improperly permitted the jury to find a burglary based on [Sanders'] intent to commit an assault." *Sanders*, 51 Cal. 3d at 517. Because the jury could have improperly found first degree felony murder by "bootstrapping" — finding burglary based on intent to assault and then using the finding of burglary to convict Sanders of "first degree murder without proof of malice aforethought and premeditation" — the California Supreme Court held the burglary-murder special circumstance instruction generally invalid.[5] *Id.* at 509, 517. Given that it was unclear from the

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5. At trial, the jury had been instructed that "it could return a verdict of first degree murder if it found the murder was committed during a burglary in which [the] defendant entered Boender's home with the intent to (1) steal, (2) commit an assault, (3) falsely imprison the victims, or (4)

evidence presented at trial whether Sanders or Cebreros actually killed Allen, and that at least one of the defendants, who may have been Sanders, said that he wanted to leave before the murder began, it is realistic to conceive that a juror could have concluded that Sanders entered Boender's apartment intending only to commit assault, not murder. If the jury had concluded that Sanders' burglary was committed with only an intent to commit assault, the jury's finding of the burglary-murder special circumstance was improper. Therefore, we cannot conclude that the facts of the case made the legal problems in the aggravating circumstance instructions harmless.

We may not conclude that the jury's consideration of these aggravating circumstances did not substantially influence the jury's assessment of Sanders' suitability for the death penalty.[6]

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dissuade the victims from testifying." *Sanders*, 51 Cal. 3d at 508.

6. In *Allen*, another California death penalty case, we concluded that a jury's consideration of improperly "inflated" special circumstances and its erroneous double-counting of prior crimes as sentencing factors had no substantial and injurious effect on the verdict. 366 F.3d at 855-58. Even disregarding the errors in counting of special circumstances and evidence of prior crimes, the jury in *Allen* had before it "extraordinarily damaging aggravating evidence" based on a defendant "orchestrating — from jail — a conspiracy to murder seven people, and succeeding in the actual killing of three, all to retaliate for their prior testimony against him and to prevent future damaging testimony." *Id.* at 828. In our independent review of aggravating and mitigating factors in that case, we held that "[a]fter weighing the total potential mitigating evidence against the evidence in aggravation, we are compelled to conclude that every juror would have reached only one result," and noted that "[t]he especially aggravating circumstances of Allen's triple murder and conspiracy [i.e., multiple murders orchestrated from prison with no showing of remorse] are those for which the Supreme Court envisions the harshest penalty."

As explained below, the facts of Sanders' case are not comparable. Whereas in *Allen* we could easily ascertain what led the jury to impose death regardless of its consideration of improper aggravating factors, here we have no such certainty.

As outlined above, California's weighing process differs from that of other weighing states. Under California law, " 'weighing' . . . connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors . . . or the arbitrary assignment of 'weights' to any of them." *Brown*, 40 Cal. 3d at 542. We cannot know as an appellate court what individual weight a juror assigned to a finding of an aggravating special circumstance. Thus we may not simply assume harmless error because of the presence of other aggravating circumstances or the absence of mitigating ones.

On the facts here, we cannot say with sufficient certainty that the jury's consideration of the two improper special circumstances did not substantially influence its sentencing determination. There is good reason to believe that the jury may have had doubts about Sanders' role in the murder and that it may thus have been only marginally inclined to impose the death penalty. There was no physical or overwhelming circumstantial evidence indicating who, as between Sanders and Cebreros, delivered the fatal blow to Allen's head.

There was also considerable uncertainty about the extent to which the murder had been pre-planned by Sanders. On the one hand, Maxwell testified that after the first attempted robbery, Sanders had expressed concern that Boender could identify him. On the other hand, Thompson told Maxwell after the murder that Allen "wasn't supposed to be dead" and "that wasn't what was planned."

[10] Similarly, the existence of other factors did not overwhelmingly compel a death sentence to the point where we can state with confidence that these circumstances, and not the invalid heinous-murder or burglary-murder special circumstances, were decisive determinants of the death sentence. Certainly, Sanders' prior violent robberies and felony

conviction were aggravating. However, the last robbery he committed was 11 years before the robbery of Boender and Allen. As for the robbery-murder and witness-killing aggravating circumstances, it is not clear they would have made the heinous murder circumstance merely superfluous, because the heinous-murder circumstance may have particularly emphasized the brutal nature of Allen's murder and thus have compelled the jurors to vote for death. The jury might have chosen to be more lenient because the means by which the victim was killed, beating rather than shooting or stabbing, do not necessarily imply an intention to cause death. The jury might also have chosen to be lenient with Sanders because Maxwell, despite her initiative in bringing about the murder, was not even charged. We cannot, of course, reconstruct the jury's penalty determination, but there is enough uncertainty in this case to cause us to believe that consideration of the improper circumstances may well have had a substantial effect or influence on the jury's determination.

The state contends that consideration of the two invalid special circumstances was harmless because when the "title special circumstance is removed from the evidence" the substance of that evidence remains intact. Even assuming that the state is correct that on the facts of this case, the jury could still have considered the "substance of the evidence" that led it to find true the invalid special circumstances, we have grave doubt as to whether it would have imposed death absent the special-circumstance label. This was a close case, for the reasons we have already discussed, including the uncertainty as to who struck the fatal blow and which assailant wanted to leave before Allen was killed. We also note that the first jury hung on guilt. In such a situation, unlike in *Morales* and *Allen* where we could easily ascertain what led the jury to impose death, in this case the jury's improper weighing of special circumstances may well have mattered.

[11] In sum, the jury was told to weigh two special circumstances that were improperly deemed special circumstances. In a weighing state, if the trier of fact is erroneously directed to weigh certain aggravating factors due to an invalid jury instruction, and that misdirection substantially affects the jury's sentencing determination, then the defendant has not received a properly individualized sentence and the error is not harmless. In these circumstances, we are required to grant habeas relief. Here, the jury was erroneously instructed on two special circumstances that it may have applied in an invalid manner, and we have grave doubt about whether that error had substantial and injurious effect or influence in determining the jury's verdict. Accordingly, applying the standards of *Brecht*, 506 U.S. at 638, and *O'Neal*, 513 U.S. at 440, we hold the error to be not harmless.

D. Remedy

[12] When there has been a failure of adequate appellate review of an erroneous sentencing instruction in the penalty phase of a capital case, the proper remedy is to grant the writ unless there is either a new penalty trial or the death sentence is vacated and a lesser sentence imposed. *Valerio*, 306 F.3d at 763 (imposing this remedy in a capital case where the Nevada Supreme Court failed to conduct adequate appellate review). We therefore reverse the district court and remand with instructions that it shall grant the petition for the writ of habeas corpus as to the penalty phase, unless the state within a reasonable period of time either grants a new penalty trial or vacates the death sentence and imposes a lesser sentence consistent with law. Because we are remanding for a new penalty trial, we do not consider Sanders' other challenges to his sentencing or to the process of appellate re-weighing of sentencing factors in California.

II. Guilt-Phase Challenge to Jury Venire

[13] Sanders also argues that the under-representation of Hispanics on his jury violated his Sixth Amendment right to an impartial jury drawn from a representative cross-section of the community. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the United States Supreme Court recognized that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528.

[14] To state a prima facie violation of the representative cross section requirement, a defendant must show that (1) the group alleged to have been excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this under-representation is due to systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). If the petitioner makes a prima facie showing under *Duren*, the burden shifts to the state to justify the under-representation "by demonstrating that attainment of a fair cross section is incompatible with a significant state interest." *Thomas v. Borg*, 159 F.3d 1147, 1150 (9th Cir. 1998); *see also Duren*, 439 U.S. at 367-68.

[15] It is undisputed that Sanders has met the first prong because "Hispanics are a 'distinctive' group for purposes of Sixth Amendment analysis." *United States v. Nelson*, 137 F.3d 1094, 1101 (9th Cir. 1998). We hold, however, that he has not met the second prong.

"The second prong . . . requires proof, typically statistical data, that the jury pool does not adequately represent the distinctive group in relation to the number of such persons in the community." *United States v. Esquivel*, 88 F.3d 722, 726

(9th Cir. 1996). In determining whether a particular group is underrepresented in a jury venire, we use an absolute disparity analysis. *Borg*, 159 F.3d at 1150. "We determine absolute disparity by taking the percentage of the group at issue in the total population and subtracting from it the percentage of that group that is represented on the master jury wheel." *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989).

[16] Here, Sanders is "unable to provide the statistics necessary for this court to determine the absolute disparity in his case," *Borg*, 159 F.3d at 1150, because the statistics he offers fail to take any account of undocumented immigrants and other legitimately ineligible jurors within the total Hispanic population. Sanders' argument for disparity comes from testimony of Dr. Terry Newell, based on Newell's study of jury venires in Kern County, California (where Sanders' trial was held) from 1980 to 1981. At that time, Kern County compiled its master jury list from voter registration records.

Dr. Newell used the following method to determine under representation on the jury venire. First, he relied on the 1980 census figures for the total population and total Hispanic population of Kern County.[7] he census listed a total population of 402,089 individuals in Kern County, including 87,025 Hispanic individuals, from which Newell calculated the Hispanic percentage of the total population to be 21.59 percent.[8] Recognizing that the census numbers for total

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7. The 1980 census numbers included both legal, documented immigrants and an unknown number of undocumented immigrants. *See* David L. Word, Nat'l Bureau of the Census, The Census Bureau Approach for Allocating International Migration to States, Counties, and Places: 1981-1991 (1992) at 2.12, *available at* http://www.census.gov/population/www/documentation/twps0001.html

8. Dividing the same numbers used by Newell (87,025 by

population and total Hispanic population included noncitizens — persons presumptively ineligible to serve on a jury — Newell attempted to estimate the number of Hispanic *citizens* in Kern county. In that calculation, however, he used a method that is insufficient on its face. Using data from the Immigration and Naturalization Service, he obtained both the total number of legal, registered aliens in Kern County (14,387) and the number of legal, registered aliens in Kern County whose country of origin was Mexico (10,230). He then subtracted the total number of legal, registered aliens from the census count of the total population of Kern County (402,089 minus 14,387, or 387,702), and the number of legal, registered aliens from Mexico from the total number of Hispanics in Kern County (87,025 minus 10,230, or 76,795). He compared those two numbers to produce an estimate of the percentage of the citizen population that was Hispanic, which he put at 19.81 percent.[9/] He then used a statistical technique that we need not describe here to account for the percentage of that population who were adults, ultimately estimating the total adult-and-citizen Hispanic population in Kern County at 16.3 percent of the total adult-and-citizen population. He compared this estimate of the adult-and-citizen Hispanic population with the percentage of Hispanics in the jury venire (which he estimated as 8.3 percent) to find an absolute disparity of 8 percentage points between the percentage of adult Hispanic citizens in the general population and the percentage of Hispanics in the jury venire.

The flaw in Newell's methodology is his assumption that every adult Hispanic person in Kern County who was not a legal, registered immigrant from Mexico was a jury-eligible United States citizen. This assumption ignored the probability

402,089), the correct number would appear to be 21.64 percent.

9. Thus, Newell divided (87,025 minus 10,230) by (402,089 minus 14,387) to get his estimate of the percentage (19.81 percent) of Hispanic citizens in Kern County.

that some Hispanic noncitizens were either illegal immigrants or did not originally come from Mexico. We need not engage in sophisticated statistical analysis to conclude that Newell's assumption is highly likely to have substantially overstated the number of Hispanic jury-eligible citizens, and thus to have substantially overstated the disparity between the percentage of Hispanics in the county and the percentage of Hispanics in the jury venire.[10/] Dr. Newell made no attempt to control for the effects of illegal immigration.

In *United States v. Artero*, 121 F.3d 1256, 1262 (9th Cir. 1997), we rejected a challenge based on the underrepresentation of Hispanics in the jury venire when the challenge was based only on a comparison between the number of Hispanics in the total population and those in the jury wheel, instead of between the population of Hispanics who were jury-eligible citizens and those in the jury wheel. Although Sanders, unlike the defendant in *Artero*, has made some attempt to separate out citizens from noncitizens, the methodology employed is so inadequate that it cannot answer the "right question," which is "whether Hispanics eligible to serve on . . . juries were unreasonably underrepresented because of systematic exclusion." *Id.* at 1261. Rather, it addresses a "different question, whether Hispanics, whether eligible to serve on . . . juries or not, were represented in jury wheels at a lower rate than their proportion of the population as a whole." *Id.*

[17] We take no position as to what statistical methods may be more appropriate in estimating the percentage of

10. This is true because it is highly likely that *Hispanic* illegal immigrants accounted for substantially more than 19.81 percent of the *total* number of illegal immigrants in Kern County at the time. Immigrants from Mexico alone made up a substantial majority (10,230/14,387, or 71.1 percent) of the legal immigrant population in Kern County, and there seems good reason to believe that the percentage of Mexicans and other Hispanics among the total number of illegal immigrants would be comparable.

undocumented immigrants or other noncitizens within a total population, and recognize that it may be difficult to calculate such numbers with precision. However, where no attempt whatsoever has been made to account for the percentage of undocumented immigrants within a total population that is likely to contain such persons, we are unable to perform the necessary inquiry in a prima facie Sixth Amendment jury-venire challenge: discovering whether the systematic exclusion of a distinctive group has prevented the group from being fairly and reasonably represented in the jury venire.[11/] As we noted in rejecting similarly flawed statistics in *Artero*, "A statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation." *Id.* at 1262 (internal quotation marks and alteration omitted). Therefore, we hold that Sanders has not established a prima facie Sixth Amendment violation.

CONCLUSION

We reverse the district court and remand with instructions to grant the petition for the writ of habeas corpus as to the penalty phase, unless the state within a reasonable period of time either grants a new penalty trial or vacates the death sentence and imposes a lesser sentence consistent with law. We affirm the district court's denial of Sanders' habeas petition with regard to the guilt phase.[12/]

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11. For example, in order to determine whether a prima facie claim of an exclusionary jury venire in violation of the Sixth Amendment has been stated, we must determine whether the absolute disparity is of sufficient extent to create a constitutional violation. *See, e.g., United States v. Suttiswad*, 696 F.2d 645, 649 (9th Cir. 1982) (finding insubstantial an absolute disparity of 7.7 percent).

12. We also deny Sanders' motion to expand the certificate of appealability and his motion for judicial notice.

AFFIRMED in part, REVERSED in part and REMANDED.

People v. Sanders
51 Cal.3d 471; 273 Cal.Rptr. 537; 797 P.2d 561 [Sept. 1990]

[No. S004439, Crim. No. 22512. Sept. 27, 1990.]

THE PEOPLE, Plaintiff and Respondent, v.
RONALD LEE SANDERS, Defendant and Appellant

SUMMARY

A jury convicted defendant of first degree murder, attempted murder, robbery, burglary, and attempted robbery. It also found true four special circumstance allegations: the murder was committed while defendant was engaged in the commission or the attempted commission of the robbery and burglary (Pen. Code, §§ 190.2, subd. (a)(17)(i) & (vii)); the victim was intentionally killed to prevent her testimony in a criminal proceeding (Pen. Code, § 190.2, subd. (a)(10)); and the murder was especially heinous, atrocious, and cruel (Pen. Code, § 190.2, subd. (a)(14)). After the penalty phase of the trial, the jury set the penalty at death. Defendant had been involved in a scheme to attempt to rob two individuals. The robbery was botched, and defendant and an accomplice returned to the individuals' apartment, stole money and drugs, and eventually struck each individual on the head. One victim died. The other victim testified at trial, identifying both defendant and the accomplice. Another person who was involved in the botched robbery attempt, but not in the homicide, also identified defendant and the accomplice. At trial, the jury panel consisted of persons drawn from voter registration rolls. Defendant introduced evidence that Hispanics were underrepresented in the jury venire, but the trial court denied defendant's motion to quash the petit jury. After challenges for cause had been completed, there were only four people with Hispanic surnames on the panel, and the prosecution peremptorily challenged each of them with peremptory challenges. During the penalty phase

of the trial, defendant chose not to present evidence of mitigating factors. (Superior Court of Kern County, No. 22079, Gerald K. Davis, Judge.)

The Supreme Court set aside the heinous, atrocious, and cruel special circumstance and the burglary-murder special circumstance, but otherwise affirmed the judgment as to both guilt and penalty. It held that defendant had not met his burden of showing that the procedure to select potential jurors was constitutionally impermissible. It held that the prosecution's use of peremptory challenges was not improper. It held that the heinous, atrocious, and cruel special circumstance was unconstitutionally vague. It held that the jury instructions improperly permitted the jury to find a burglary based on defendant's intent to commit an assault. It also held that a witness-killing special circumstance may be found true whether or not an actual criminal proceeding was pending or about to be initiated at the time of the crime, and that the two invalid special- circumstance findings did not require reversal of the sentence. It further held that it was not incompetence for defendant's attorney to accede to defendant's wish not to present mitigating evidence at the penalty trial. (Opinion by Lucas, C. J., with Panelli, Eagleson, Kennard and Arabian, JJ., concurring. Separate dissenting opinions by Mosk, J., and Broussard, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c)Jury §30.5—Selection and Formation of Jury—Exclusion of Certain Persons and Classes—Underrepresentation of Hispanics in Jury Venire Selected From Voting Registration List.—In a homicide prosecution, the trial court did not err in denying defendant's motion to quash the petit jury on the ground that the manner in which the county assembled its master jury list violated his right to an impartial jury drawn from a fair cross-section of the

community. Although defendant presented refined statistics that Hispanics, a distinct group for purposes of analyzing whether a jury reflects a fair cross-section of the community, were underrepresented in the panel, he did not satisfy his burden of making out a prima facie case that the underrepresentation was due to a systematic exclusion of Hispanics. Evidence that a race-neutral selection process operates to permit the de facto exclusion of a higher percentage of a particular class of juror than would occur from a random draw is not sufficient. The defendant must identify an aspect of the selection process that is the probable cause of the disparity and constitutionally impermissible. When the prosecution occurred, the county assembled its master jury list by randomly drawing names from voter registration lists, and this method has not been judicially determined to be constitutionally impermissible. [Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, note, 1 A.L.R.2d 1291; see also 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2637.]

(2)Jury §30—Selection and Formation of Jury—Exclusion of Certain Persons and Classes—Defendant's Showing of Prima Facie Case of Exclusion—Prosecution's Rebuttal.—Should a defendant make out a prima facie case, using statistics, that the number of a certain racial group in a county is systematically underrepresented in jury panels, the People may rebut that showing with statistics that take into account additional persons who are jury ineligible, such as noncitizens or ex-felons.

(3)Jury §28—Selection and Formation of Jury—Drawing, Summoning, and Impaneling Jurors—Right to Representative Cross-section of Community.—In California, the right to trial by jury drawn from a representative cross-section of the community is guaranteed equally and independently by U.S. Const., 6th Amend., and Cal. Const., art. I, § 16. In order to establish a prima facie showing of violation of the fair cross-section requirement, the defendant must show: that the group alleged to be excluded is a distinctive group in

the community; that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and that this underrepresentation is due to systematic exclusion of the group in the jury selection process. If a defendant demonstrates a prima facie case of systematic underrepresentation under this tripartite test, the burden shifts to the state to come forward with either a more precise statistical showing that no constitutionally significant disparity existed, or that there was a compelling justification for the procedure that results in the disparity in the jury pool.

(4)Constitutional Law §25—Constitutionality of Legislation—Rules of Interpretation—Presumption of Constitutionality.—In considering the constitutionality of a legislative act, the court presumes its validity, resolving all doubts in favor of the act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, the court must uphold the act.

(5)Jury §30—Exclusion of Certain Persons and Classes—Violation of Statute.—In a homicide prosecution, defendant did not satisfactorily show that the method in which the county selected jurors violated former Code Civ. Proc., § 204.7 (random selection of jurors; appropriate source lists) (supplanted by Code Civ. Proc., § 197). Thus, the trial court properly denied defendant's motion to quash the jury venire. The county's jury list relied exclusively on voter registration polls and was assembled once a year. The list in use at the time of defendant's motion had been compiled the previous year. Although the county intended to complete a project in which it also selected prospective jurors from Department of Motor Vehicles records, the panel for that year had already been selected and the cost to modify the list would have been prohibitive to the county.

(6a,6b)Jury §47.5—Challenges—Group Bias—Hispanic Persons—Satisfactory Proof of Wrongful Use of Peremptory Challenges.—In a homicide prosecution, defendant did not

meet his burden of showing a strong likelihood the prosecution wrongfully used peremptory challenges to exclude Hispanics from the jury. Although the prosecution dismissed the only four Hispanic prospective jurors remaining after other jurors had been challenged and excused for cause, three of the four had expressed doubts during voir dire questioning about the ability to apply the death penalty and the fourth had admitted past arrests. Thus, there were sufficient reasons for the prosecution to dismiss the jurors other than their ethnicity. Also, the record showed that the trial judge, in ruling on defendant's objections, was aware of its duty to ensure that jurors were not excused due to a perceived group bias.

(7)Jury §47.5—Challenge—Peremptory—Group Bias.—Peremptory challenges may not be used to exclude from a jury, solely because of a presumed group bias, all or most members of an identifiable group of citizens distinguished on racial, religious, ethnic, or similar grounds. Such improper exercise of peremptory challenges violates Cal. Const., art. I, § 16, as well as the equal protection clause of the United States Constitution. If a party believes his opponent is using his peremptory challenges to strike jurors on the grounds of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. If the trial court finds the moving party has made a prima facie case, the burden shifts to the opponent to explain its peremptory challenges.

(8)Jury §48—Challenges—Peremptory—Examination as Basis—Inquiry as to View on Capital Punishment—Questioning of Hispanic Prospective Jurors.—In a homicide prosecution, the trial court did not err in finding that defendant had not made a prima facie showing a strong likelihood that the prosecution was motivated by group bias rather than specific bias in excusing by way of peremptory challenges the only four Hispanic prospective jurors. Although the excused jurors may have been otherwise as heterogenous as the community as a whole, and this fact may under some circumstances support a finding of a prima facie case, comparisons between jurors is not often a fruitful exercise. The very dynamics of the jury selection process makes it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenges of one juror with the retention of another juror that on paper appears to be substantially similar. Such a comparison is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected.

(9)Jury §47—Use of Peremptory Challenges in Violation of Right to Equal Protection—Analysis Under State and Federal Constitutions.—The procedure for establishing a prima facie case of wrongful use of peremptory challenges in violation of a criminal defendant's federal constitutional right to equal protection of the laws is similar to that procedure addressing state constitutional concerns.

(10)Jury §43—Challenges—For Cause—Voir Dire—Inquiry as to View on Capital Punishment—Trial Court's Duty to Instruct Juror.—In a homicide prosecution, the trial court did not err in excusing for cause a venireman who stated that he did not believe in the death penalty in every instance. In such circumstances, the trial court must determine whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath. The appellate court's duty is to examine the context surrounding the juror's exclusion to determine whether the trial court's decision, that the juror's belief would substantially impair the performance of his duties, was fairly supported by the record. The venireman's expressed

antipathy to the death penalty would have undoubtedly substantially impaired the performance of his duties as a juror. Also, the trial court had no obligation to instruct the juror to set aside his personal feelings and obey the law.

(11a,11b)Criminal Law (1984) §408—Evidence—Admissibility—Opinion Evidence—Expert Witnesses—Subjects of Expert Testimony—Reliability of Eyewitness—Erroneous Exclusion of Testimony—Other Evidence Corroborating Eyewitness.—In a prosecution for murder and attempted murder, the trial court's error, if any, in excluding expert psychological testimony on the reliability of an eyewitness (the victim) who identified defendant, was harmless. Although the witness was qualified on the subject and the eyewitness's identification was a key element of the People's case, there was other corroborative evidence supporting the eyewitness identification of defendant. The eyewitness had positively recognized defendant from a botched robbery attempt that had occurred two days earlier; an accomplice's statement to police dovetailed with the eyewitness's description of the crimes and gave defendant a motive to kill the victims; the accomplice's description of defendant and another accomplice matched the eyewitness's description; and physical evidence linked defendant with the crimes.

(12)Criminal Law (1984) §657—Appellate Review—Harmless and Reversible Error—Evidence—Opinion Testimony on Reliability of Eyewitness.—When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony. However, exclusion of such evidence requires reversal only if it results in a miscarriage of

justice.

(13a,13b)Jury §42—Challenges—For Cause—Voir Dire—Inquiry as to Bias, Prejudice, and Opinion—Inquiry into Jurors' Opinions of Witnesses' Perceptions.—In a homicide prosecution, the trial court did not abuse its discretion by, during voir dire, sustaining the prosecutor's objection to defense questions that sought to elicit the opinions of potential jurors concerning the effects of stress on perception. Defendant planned to demonstrate with the challenged questions that the jurors did not have common knowledge of the effects of stress on perception and intended to lay the groundwork for the introduction of expert testimony on that subject. Since the challenged questions at voir dire were not related to aiding the exercise of peremptory challenges, but instead were intended to support defendant's position on an evidentiary question, the court did not abuse its discretion in excluding them.

(14)Jury §39—Challenges—For Cause—Purpose of Voir Dire—Aiding Counsel in Exercising Peremptory Challenges.—The purpose of questioning at voir dire is to assist the attorneys in the exercise of their peremptory challenges, not to provide foundational support for their evidentiary motions. Counsel should be allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges, whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause.

(15a,15b)Criminal Law (1984) §330—Evidence—Admissibility—Identification of Defendant—Pretrial Photographic Identification—Not Suggestive—Witness- victim's Identification of Defendant Bolstered by His Identification of Accomplice.—In a prosecution for murder of one person and the attempted murder of another, the identification of defendant by a victim-witness was not invalid notwithstanding the victim-witness's identification of an accomplice in a photographic lineup in which the accomplice's picture was the only one that matched

the victim-witness's description of the accomplice. The victim-witness had also testified that he clearly viewed his assailants and focused on his attackers' faces in order to identify them if he survived the attack; he was certain of his identification of the accomplice who matched both his and another witness's description; and only two days passed between the crime and the victim-witness's selection of the picture from the photographic array. Although the photographic array was somewhat suggestive, under the totality of the circumstances it did not demonstrate that there was a very substantial likelihood of irreparable misidentification.

(16)Criminal Law (1984) §316—Evidence—Admissibility—Identification of Defendant—Violation of Due Process.—A violation of due process occurs if a pretrial identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Whether due process has been violated depends on the totality of the circumstances surrounding the confrontation. The burden is on the defendant to show that the identification procedure resulted in such unfairness that it abridged his rights to due process.

(17)Criminal Law (1984) §321—Evidence—Admissibility—Identification of Defendant—Police Lineup Prior to Trial—Factors Showing Impermissibly Suggestive Lineup.—The factors to be considered in determining whether a lineup is impermissibly suggestive include the opportunity of the witness to view the criminal at the scene of the crime, the witness's degree of attention, the accuracy of the prior description of the criminal, the level of certainty demonstrated at the confrontation, the time between the crime and the confrontation, and the suggestiveness of the procedure employed.

(18a-18c)Homicide §85—Instructions—Felony Murder—Homicide Committed During Burglary in Which Defendant Intended to Commit Assault.—In a homicide prosecution, the trial court erred in instructing the jury that it

might convict defendant of first degree murder if it found that the killing occurred during a burglary in which defendant's intent was to commit an assault. The court may not bootstrap by instructing the jury that the intent to assault makes the entry burglary and that the burglary raises a homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation. However, the error was not prejudicial, since the jury was presented with other legally permissible alternative theories of guilt along with the legally impermissible theory, and the jury necessarily found the commission of first degree murder under at least one of the permissible theories.

(19)Homicide §16—Felony Murder—Felony Burglary Based on Intent to Assault.—A burglary based on an intent to assault cannot support a felony-murder jury instruction.

(20)Homicide §110—Appeal—Harmless and Reversible Error—Instructions—Multiple Theories of Murder—One Impermissible Theory.—Where a jury in a homicide prosecution is presented with multiple legally permissible theories of guilt and one legally impermissible theory, the applicable rule on appeal is clear: reversal is required only if the reviewing court cannot determine from the record on which theory the jury relied.

(21a,21b)Homicide §87—Instructions—Identity and Participation in Offense—Accomplice to Other Crimes Committed Prior to Homicide.—In a prosecution for murder, attempted murder, and robbery, the trial court's error, if any, in submitting to the jury the question of whether a testifying witness was an accomplice to the crimes was harmless. Although the witness admitted to being an accomplice to a bungled robbery attempt perpetrated against the same victims two days prior to the incident which resulted in the crimes at issue, the evidence was not strong that she was an accomplice to the subject crimes. Also, even if the trial court should have instructed the jury that all of the witness's testimony was subject to the corroboration requirement of Pen. Code, § 1111

(accomplice's testimony requires corroboration), there was corroboration: her descriptions of defendant and another accomplice were accurate and very similar to a surviving victim's descriptions, and physical evidence supported her testimony. Thus, it was not reasonably probable that the jury would have reached another result in the absence of any error.

(22)Criminal Law (1984) §241—Trial—Province of Court and Jury—Determination Whether Witness Accomplice.—When the evidence concerning whether a witness was an accomplice to a crime is undisputed, it is a question of law for the trial judge to decide. However, if the facts are disputed or susceptible of different inferences, the question whether the witness is an accomplice should be submitted to the jury.

(23)Criminal Law (1984) §128—Interrogation; Advice as to Constitutional Rights—Waiver of Rights—Requirement That Waiver Be Knowing and Voluntary.—A defendant may waive effectuation of the constitutional rights conveyed in an interrogating officer's warnings that the defendant may remain silent and seek an attorney, provided the waiver is made voluntarily, knowingly, and intelligently. The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that these rights have been waived.

(24)Criminal Law (1984) §129—Interrogation; Advice as to Constitutional Rights—Determination by Trial Court—Waiver of Rights Where Defendant Was Not Apprised of Charges Against Him.—In a homicide prosecution, defendant's waiver of his constitutional right to

remain silent was not invalid, notwithstanding that police did not advise him before interrogation that he was being charged with murder. A valid waiver does not require that an individual be informed of all information useful in making his decision or all information that might affect his decision to confess. The Constitution does not require that the police supply a suspect with a flow of information to help him calibrate his self- interest in deciding whether to speak or stand by his rights.

(25)Criminal Law (1984) §397—Admissibility—Demonstrative Evidence—Photograph of Victim.—In criminal prosecutions, the admission of photographs of a victim lies in the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect.

(26)Homicide §59—Admissibility—Demonstrative Evidence—Photograph of Homicide Victim.—In a homicide prosecution, the trial court's error, if any, in admitting photographs of the homicide victim, taken at the crime scene and during the autopsy, was harmless. Although the photographs may have been offered to support the prosecution's impermissible theory (as a special circumstance) that the murder was particularly "heinous, atrocious and cruel," they were also offered to indicate the manner the crime had been committed and to corroborate the testimony of the medical expert regarding the nature of the fatal blow. Also, the trial court found the photographs neither outrageous nor inflammatory. Since there was other strong evidence of guilt, it was not reasonably probable a result more favorable to defendant would have occurred in the absence of any error.[Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, note, 73 A.L.R.2d 769.]

(27)Homicide §78—Instructions—Nature and Elements of Offense—Intent—Felony-murder Special Circumstance.—The jury may sustain a felony-murder special-circumstance allegation against the actual killer without

finding the killer acted with the intent to kill.

(28)Homicide §78—Instructions—Nature and Elements of Offense—Intent—Felony-murder Special Circumstance—Application to Aider and Abettor.—In order to sustain a felony-murder special-circumstance allegation against an aider and abettor, the jury must find the aider and abettor acted with the intent to kill.

(29)Homicide §78—Instructions—Nature and Elements of Offense—Intent—Felony-murder Special Circumstance—Possibility That Accomplice Other Than Defendant Committed Killing.—In a homicide prosecution in which it was not proved whether defendant or his codefendant was the actual killer of the victim, the trial court did not err in instructing the jury on the felony-murder special circumstance without requiring a finding of intent to kill. The jury was instructed on two different theories of aiding and abetting: one stated that a person aids and abets if he intentionally aids the commission of a crime; the other instruction stated that if defendant was an aider and not the actual killer, to find first degree murder the jury must find beyond a reasonable doubt that defendant aided and abetted the actual killer in the commission of a murder in the first degree. Under these instructions, the jury necessarily found that if defendant was an aider and not the actual killer, he acted with intent to kill.

(30)Homicide §101—Punishment—Death Penalty—Special Circumstance—Felony Murder—Burglary.—A burglary-felony-murder special circumstance is improper and must be set aside where the instructions permit the jury to find a burglary based on the defendant's intent to commit an assault. [See Cal.Jur.3d (Rev), Criminal Law, §§ 3341, 3343.]

(31)Homicide §101—Punishment—Death Penalty—Witness-killing Special Circumstance.—If an accused believes himself to be exposed to criminal prosecution and intentionally kills another to prevent that person from testifying in an anticipated or pending criminal proceeding, a

witness-killing special circumstance (Pen. Code, § 190.2, subd. (a)(10)), may be found true whether or not an actual criminal proceeding was pending or about to be initiated. Thus, in a homicide prosecution, a jury may sustain a witness-killing special-circumstance allegation, notwithstanding that the absence of any pending criminal proceeding at the time of the killing. [See 3 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 1576.]

(32)Homicide §101—Punishment—Death Penalty—Order of Instructions.—In a prosecution for first degree murder, the trial court did not impermissibly confuse the jury by delivering an instruction defining the crime of dissuading a witness (Pen. Code, § 136.1) immediately before instructing the jury on the witness-killing special circumstance (Pen. Code, § 190.2, subd. (a)(10)). Even though defendant was not charged with violating § 136.1, the jury was also instructed on burglary, a charged offense. In addition to robbery, assault, and false imprisonment, dissuading a witness was listed as a possible felony that defendant intended to commit when he entered the victim's apartment. Thus, the challenged instructions explained a general principle of law relevant to the issues raised by the evidence and was necessary for the jury's understanding of the case. Also, any potential confusion between the crime of dissuading a witness and the witness-killing special circumstance was dispelled by the explicit instruction on the special circumstance.

(33)Criminal Law (1984) §244—Trial—Order of Instructions.—The general rule is that the order in which jury instructions are given is immaterial. [See Cal.Jur.3d (Rev), Criminal Law, § 3052.]

(34)Homicide §101—Punishment—Death Penalty—Witness-killing Special Circumstance—Intent Requirement.—Pen. Code, § 190.2, subd. (a)(10) (witness-killing special circumstance), does not require the jury to find that but for the intent to prevent the victim from testifying, the victim would not have been killed.

(35)Homicide §101—Punishment—Death Penalty—Sufficiency of Evidence—Witness-killing Special Circumstance.—In a homicide prosecution, there was sufficient evidence from which the jury could infer that defendant intended to kill the victims due to their ability to identify him as the perpetrator of an earlier robbery attempt on the victims, where the evidence showed that shortly after the prior robbery attempt defendant expressed concern that the intended victims could identify him; defendant sought an accomplice to accompany defendant to the victims' apartment; and defendant and his accomplice bound and blindfolded the victims, moved them to separate rooms, and struck each savagely on the back of the head. Thus, the evidence supported the jury's finding true an allegation of witness-killing special circumstance (Pen. Code, § 190.2, subd. (a)(10)).

(36)Homicide §101—Punishment—Death Penalty—Constitutionality—Heinous, Atrocious, and Cruel Special Circumstance.—Pen. Code, § 190.2, subd. (a)(14) (special circumstance for murder that was heinous, atrocious, and cruel), is unconstitutionally vague.

(37)Criminal Law (1984) §520—Punishment—Penalty Trial—Excessive Special Circumstances Allegations.—The jury's determination that four special circumstance findings were true did not require reversal, notwithstanding that two of the special circumstances findings (heinous, atrocious, and cruel murder; burglary- murder), were invalid. The jury properly considered the two valid special circumstances (robbery-murder; witness-killing). The prosecutor did not urge the jury to impose the death penalty merely because of the invalid special circumstances. Instead, he described and emphasized the circumstances of the crime generally.

(38)Criminal Law (1984) §523—Punishment—Penalty Trial—Instructions—Weighing of Aggravating and Mitigating Factors—Use of Word "Shall" Directing Jury to Impose Sentence of Death.—In the penalty phase of a homicide prosecution, the trial court did not err in the use of the

word "shall" in instructing the jury that if aggravating circumstances outweighed the mitigating circumstances, the jury "shall" impose a sentence of death. Whether the unadorned "shall" instruction requires reversal depends upon the facts of each individual case. The issue is whether the instructions in conjunction with the prosecutor's arguments adequately informed the jury of its weighing and decision-making responsibility. In this prosecution, the jury was instructed with the pattern jury instruction that detailed the various aggravating and mitigating factors in the language of the statute and instructed the jury to consider, take into account, and be guided by the factors. There was nothing in the instructions, or in the prosecutor's argument, that stated the jury must merely count the various factors instead of evaluating the moral weight of each factor. The prosecutor's contention that this was a proper case to impose the death penalty did not divest the jury of its discretion or lead the jurors to believe they had no choice but to impose the death penalty.

(39a,39b)Criminal Law (1984) §521—Punishment—Penalty Trial—Defendant's Failure to Present Mitigating Evidence.—In a homicide prosecution, the fact that defendant decided to forgo presentation of mitigating evidence at the penalty phase did not require reversal of a death penalty. Although the absence of mitigating evidence may undermine the state's interest in a reliable penalty determination, defendant cannot be forced to present evidence. The reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. Also, defendant's decision not to present evidence at the penalty trial was not tantamount to a guilty plea without consent of his counsel in violation of Pen. Code, § 1018. His choice did not amount to an admission that

he believed death was the appropriate penalty, nor did he give up his right to confront or cross-examine those testifying against him at the penalty trial.

(40)Criminal Law (1984) §101—Rights of Accused—Competence of Defense Counsel—Defendant's Failure to Present Mitigating Evidence at Penalty Trial of Homicide Prosecution.—A defendant is not unconstitutionally denied adequate representation by his counsel's acceding to his wishes to decline to present available mitigating evidence at the penalty phase of a capital trial. Thus, defendant's knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase of his trial estopped him from claiming an entitlement to a reversal of the death judgment based on those decisions.

(41)Criminal Law (1984) §523—Punishment—Penalty Trial—Dual Use of Underlying Crimes.—In the penalty phase of a capital prosecution, the trial court did not err in failing to modify the standard penalty phase instruction to make clear that Pen. Code, § 190.3, factor (b) (permits the jury to consider, as an aggravating or mitigating factor, the presence or absence of criminal activity by the defendant which involved the use or attempted use of violence or the express or implied threat to use force or violence), pertained to criminal activity other than that for which defendant was convicted in the capital case. Notwithstanding the failure to modify the instruction, there was no possibility the jury was misled into "double counting" the circumstances of defendant's crimes when weighing the various factors during the penalty phase deliberations.

(42)Criminal Law (1984) §523—Punishment—Penalty Trial—Instructions—Multiple Special Circumstances.—In the penalty phase of a capital prosecution, the trial court did not err in permitting the jury to consider both the robbery-murder special circumstance and the burglary-murder special circumstance in its penalty deliberation. Even if a robbery and burglary were committed as part of an indivisible transaction,

any robbery and burglary committed by the defendant in the course of his homicidal conduct may properly be considered an independent aggravating factor. Each involves violation of a distinct interest that society seeks to protect, and a defendant who commits both offenses in the course of a murder may be deemed more culpable than a defendant who commits only one.

(43)Homicide §104—Appeal—Intercase and Intracase Proportionality Reviews.—On an appeal of a sentence of death, defendant was not entitled to either intercase or intracase proportionality review of his punishment. Neither the federal nor the state Constitution compels a comparative (intercase) sentence review. Also, even though defendant's accomplice did not receive the death penalty, the imposition of a death sentence involves a peculiarly normative and individualized determination making intracase review inappropriate.

COUNSEL

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Christopher N. Heard as Amicus Curiae on behalf of Plaintiff and Respondent.

OPINION

LUCAS, C. J.—Ronald Lee Sanders was convicted of first degree murder, attempted murder, robbery, burglary, and attempted robbery. Two allegations that he was armed with a firearm were found true. The jury also found true four special circumstance allegations: the murder was committed while defendant was engaged in the commission or the attempted commission of the robbery and burglary (Pen. Code, § 190.2, subd. (a)(17)(i) & (vii));[1/] the victim was intentionally killed to prevent her testimony in a criminal proceeding (§ 190.2, subd. (a)(10)); and the murder was especially heinous, atrocious and cruel (§ 190.2, subd. (a)(14)). After the penalty phase of the trial, the jury set the penalty at death. This appeal is automatic. (§ 1239, subd. (b).)

For the reasons stated below, we set aside the special circumstance findings based on the commission of a burglary and on the jury's conclusion that the murder was heinous, atrocious and cruel, but otherwise affirm the judgment in its entirety.

I. Facts

Guilt Phase

In 1981, Dale Boender and Janice Allen moved to Bakersfield from Oildale. Boender supported the couple by selling cocaine and marijuana. One of his customers was Brenda Maxwell, but he stopped selling to her because she owed him money from prior transactions. On the morning of January 21, 1981, Maxwell's aunt, Donna Thompson, and defendant Ronald Lee Sanders visited Maxwell. The three decided to rob Boender of drugs and money and agreed to the following plan: Maxwell would entice Boender to her home by claiming she had a friend who wanted to buy a large quantity of cocaine. When Boender

1. All further statutory references are to the Penal Code unless otherwise indicated.

arrived, defendant would knock him out and they would rob him. Defendant would then bind Boender with duct tape before leaving. According to their plan, defendant would similarly bind Maxwell so she would appear to also have been a victim. Thompson would arrive later to "discover" and free the pair.

Maxwell's friend, Glen Blackford, was also visiting her at the time but was left in the living room while Maxwell, Thompson, and defendant planned the crime in the bedroom. When they returned to the living room after their planning session, Maxwell told Blackford "[s]omething is going to happen [so] get out of here." Blackford and Thompson then left (as planned) and Maxwell placed several calls to Boender to arrange the deal.

Enticed by the promise of a large cocaine sale, Boender and Allen drove to Maxwell's mobilehome. Allen entered the home and began to sit down next to Maxwell. As Boender stepped through the doorway, defendant emerged from the kitchen and began beating Boender with a two-foot long piece of a pool stick. A struggle ensued but Boender and Allen eventually managed to exit the mobilehome, at which point defendant fled. Boender and Allen then drove off, first to a friend's house but later to a hospital to attend to Boender's injuries. They stayed at a relative's home until Friday, January 23,1981.

Meanwhile, Thompson and defendant returned to Maxwell's mobilehome to discuss the aftermath of the botched robbery attempt. Maxwell was concerned that Boender would realize she had "set him up," and defendant was worried Boender could identify him. The three drove to a house on Jefferson Street where defendant engaged the assistance of John Cebreros. The group then went to Thompson's house where Maxwell called mutual friends of hers and Boender's to tell them she had been robbed and raped so as to enhance her claim that she had been victimized along with Boender.

On Friday, Boender and Allen decided to return to Boender's apartment. They arrived in the afternoon and told Boender's two roommates, Haney and Weinman, about the earlier assault.

Later, Boender and Allen met Boender's former roommate, George Littleton, at a bar; the three of them went to Littleton's apartment around 7 p.m. and shared a small bottle of wine. After shopping for groceries, Boender and Allen returned home. Haney and Weinman were gone for the evening.

While Boender and Allen were preparing dinner, there was a knock at the door. Leaving Allen in the kitchen, Boender went to the front door and opened it, finding Cebreros and defendant standing there, the latter armed with a gun. Although he believed he had only seconds to live, Boender concentrated on their faces so he could remember them if he should see them again. Defendant spun Boender around and pushed him to the floor, face down. He felt someone's knee in his back and something pressed against his neck. Allen emerged from the kitchen and was also made to lie on the floor. Boender's glasses were ripped from his face and both he and Allen were bound and blindfolded.

One of the assailants demanded that Boender tell them where he kept his cocaine, and he directed them to Allen's purse. After he told them his money was in his shirt pocket, someone removed it. Boender heard the two assailants rummaging through the apartment but could not tell what was going on. After a few minutes, he was dragged to what seemed like his bedroom. He heard more footsteps, muffled talking, and more banging around the apartment. One of the assailants said he wanted to leave but the other said he wanted to stay. Boender then heard someone approach, felt a blow to the head, and recalled nothing further.

Boender's roommates returned to the apartment in the early morning and discovered the apartment full of smoke. A search revealed food burning in the oven. On further investigation, they discovered Boender in his bedroom, lying in a pool of blood. After calling an ambulance, they noticed that the apartment was in disarray, there were spots of blood around, and a baggie of marijuana was missing. When Haney found Allen's body in his bedroom, he called the police.

Both Boender and Allen had been bound by lengths of electrical cord cut from Boender's vacuum cleaner. Allen sustained a fatal head wound which fractured her skull and lacerated her brain. Boender suffered a skull fracture but was conscious and semicoherent when police arrived. He was not questioned until the next day.

Haney and Weinman told police about Boender's story of the attempted robbery two days earlier, prompting police to contact Maxwell. She falsely told police that Cebreros came to her home, forced her to call Boender, and then beat him up when he arrived. However, she gave them accurate descriptions of defendant and Cebreros as well as the address of the Jefferson Street house where defendant met Cebreros. From his hospital bed, Boender gave descriptions of defendant and Cebreros that matched Maxwell's descriptions.

Cebreros was arrested the next day in front of the Jefferson Street house. In his car, police found a gun similar to that which Boender described as the one used in the attempt to murder him. In Cebreros's boot, police found a baggie of marijuana which was identical to the one taken in the robbery. Both Maxwell and Boender positively identified Cebreros as one of the assailants.

A few days later, Maxwell recanted her story and told police the truth about the bungled robbery attempt. She also told police about the duct tape defendant intended to use to bind Boender. Police found a roll of such tape in Maxwell's home and tests revealed defendant's fingerprints on it. He was arrested and positively identified by Boender in a photographic lineup later that week.

Defendant and Cebreros were tried jointly and they presented an alibi defense. Three defense witnesses testified that on the night of the murder, both defendant and Cebreros were at the home of Cebreros's brother, Salvador, talking, playing chess, and drinking beer. There was also evidence from Boender's neighbors that although two men were seen outside Boender's apartment on the night of the murder, neither one looked like Cebreros or defendant. Finally, there was evidence that

defendant had used Maxwell's roll of duct tape for an innocent purpose a few days earlier.

Defendant's first trial ended in a mistrial when the jury could not reach a verdict. On retrial, both he and Cebreros were convicted on all counts. The prosecutor declined to seek the death penalty against Cebreros and he was sentenced to life without the possibility of parole.

Penalty Phase

The prosecution produced several witnesses at the penalty phase who described five armed robberies defendant committed in Orange County in 1970. Although none of the witnesses could positively identify defendant at trial, a police expert testified that the fingerprints of the gunman in the five Orange County robberies matched defendant's fingerprints.

James Quinn testified that on October 1, 1970, he was working late at the Allstate Motel in Santa Ana when defendant and a crime partner robbed him at gunpoint. Thomas Ferguson testified that defendant, brandishing a revolver, robbed him on September 12, 1970, while Ferguson was employed as a clerk at the Station Liquor Store in Tustin. Defendant committed an armed robbery in the same establishment on November 20, 1970, this time robbing clerk Fred Turnbull.

Sammy Mitchell testified that he was working in Mitchell's Market in Tustin on October 6, 1970, when defendant robbed him at gunpoint. Defendant was finally arrested after this crime spree while fleeing from yet another armed robbery, this one occurring in a 7-Eleven convenience store, also in Tustin. Defendant confessed his guilt to all five robberies and the police officers to whom he confessed testified at the penalty phase. Defendant was sentenced to state prison and was granted parole in 1973.

Defendant declined to present any evidence in mitigation or make a closing argument. The jury returned a verdict of death within a few hours.

II. Discussion

A. *Jury Selection Issues*

1. *Systematic Underrepresentation in the Jury Pool*

(1a) Before trial, defendant moved to quash the petit jury, arguing that the manner in which Kern County assembled its master jury list violated his right to an impartial jury drawn from a fair cross-section of the community.[2] In support, he presented evidence that he claimed demonstrated a prima facie case that Hispanics were systematically underrepresented in the jury pool. The trial court denied the motion, and defendant now renews the contention.

a. *The Evidence Supporting the Motion to Quash*

At the time of defendant's trial, Kern County assembled its master jury list by randomly drawing names from the county's voter registration list. Questionnaires were then sent to those chosen to determine eligibility to serve as jurors. There was no attempt to ensure that the ethnic composition of the group selected for jury service approximated that of the county as a whole. Although there were plans in the future to use names of those holding driver's licenses to supplement those names from the voter registration lists when assembling the master jury list, such plans had not yet been implemented at the time defendant was tried.

The parties stipulated that defendant could rely, in support of his motion to quash, on the expert testimony presented in three

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2. Although defendant initially frames this issue in terms of a challenge to the assembly of the master jury list, it appears that, either by stipulation or acquiescence, he, the People, and the trial court understood the basis of the motion to be a challenge to the composition of the jury venires in the county, because defendant's evidence went to the racial composition of those appearing for jury duty.

other recent Kern County Superior Court cases.(See *People* v. *Cantu*, Nos. 21891, 22229 (*Cantu*); *People* v. *Robinson*, No. 21518 (*Robinson*); *People* v. *Streeter*, Nos. 22346, 22056, 21910, 21368 (*Streeter*).) Dr. Newell, an expert in psychology and statistics, testified in the *Cantu* and *Robinson* cases (and his testimony was admitted in the *Streeter* case). He stated that he had scrutinized the available data from the 1980 census and had analyzed jury panels in Kern County between October 1980 and February 1981, as well as panels in May 1981. In *Cantu*, he testified that the government census reported that Kern County was 21.59 percent Hispanic, and estimated that 17.76 percent of the county was both Hispanic and at least 18 years old, i.e., presumptively jury eligible.[3] To determine the ethnic makeup of the group summoned for jury duty during the period in question, Dr. Newell scrutinized the master jury list, presumably noting those with Spanish surnames. He also conducted telephone surveys to confirm the number of those on the list who were Hispanic. He concluded that 8.3 percent of those appearing for jury duty were Hispanic.

In the *Robinson* case a few months later, Dr. Newell presented even more refined statistics. From the Immigration and Naturalization Service, he obtained the information that 14,387 Hispanic resident aliens resided in Kern County in 1978. (Such evidence was not available for 1980.) Deducting that number from the total number of Hispanics in the county (based on 1980 census figures), Dr. Newell opined that 19.81 percent of Kern County residents were Hispanic. (2)(See fn. 4.)[4] Using

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3. To arrive at the 17.76 percent figure, Dr. Newell derived a ratio using the available data from the 1970 census. In that year, 16.9 percent of the county was Hispanic and 13.9 percent was both Hispanic and at least 18 years old. Dr. Newell testified that, if anything, this method underestimated the number of jury-eligible Hispanics in the county because of a trend during the 1970's toward smaller families.

4. By using such refined statistics, defendant's case does not present the question whether use of total population figures is permissible. Previously, a three-justice plurality of this court concluded a defendant could use total countywide population numbers in making his prima facie case of a constitutional violation. (*People* v. *Harris* (1974) 36 Cal.3d 36, 54-55 [201 Cal.Rptr. 782, 697 P.2d 433].) However, we later held "*Harris* should not be applied retroactively to cases in which juries were selected before the *Harris* decision was rendered." (*People* v. *Myers* (1987) 43 Cal.3d 250, 269 [233 Cal.Rptr. 264, 729 P.2d 698].) And recently, this court held that henceforth, "a defendant who has access to census or other demographic data that reflect adult population figures must base his challenge on that date." (*People* v. *Bell* (1989) 49 Cal.3d 502, 526, fn. 12 [262 Cal.Rptr. 1, 778 P.2d 129]; see also *id.* at p. 556 [conc. opn. by Kaufman, J.].)

Because defendant provided refined statistical data and did not rely on *Harris's* holding permitting reliance on total population figures, we need not resolve the question of whether this court violated equal protection principles by holding, in *Myers, supra,* 43 Cal.3d 250, that the *Harris* holding should not be applied retroactively. (See *Myers* v. *Ylst* (9th Cir. 1990) 897 F.2d 417.)

Defendant and the People engage in extended argument concerning whether the record indicates Dr. Newell had calculated the number of noncitizens in the county before arriving at the 16.3 percent figure. We need not decide this point since he clearly presented statistics based on the number of Hispanics in the county over the age of 18 and this refinement is sufficient. (*Bell, supra,* 49 Cal.3d at p. 526, fn. 12.) Should a defendant make out a prima facie case, however, the People may rebut that showing with statistics which take into account additional persons "who are jury ineligible--*noncitizens*, ex-felons, etc." (*Ibid.*, italics added.)

the same methodology as in the *Cantu* case (see fn. 3, *ante*), he estimated that 16.3 percent of the county was made up of adult Hispanics.4 He reiterated that 8.3 percent of those appearing for jury duty were Hispanic. He concluded that the likelihood the exhibited disparity would occur by chance was one in one million.

After reading the transcripts of the *Cantu, Robinson,* and *Streeter* cases and hearing argument on the issue, the trial court denied without prejudice defendant's motion to quash, stating, "I do believe that there has been a prima facie showing that there is a disproportionate number of people with Hispanic surnames called for jurors, but I am not sure that that means a thing, and everybody knows by reading the Los Angeles Times and any other publication that there are an enormous number of

people in this country illegally or green card-wise [sic] who are not even citizens. [¶] So, I don't think that really in and of itself means anything." Defendant renewed the motion later and it was again denied.

b. *The Fair Cross-section Principle*

(3) "In California, the right to trial by jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution (*Taylor* v. *Louisiana* (1975) 419 U.S. 522, 530 [42 L.Ed.2d 690, 698, 955 S.Ct. 692]) and by article I, section 16 of the California Constitution. (*People* v. *Wheeler* (1978) 22 Cal.3d 258, 272 [148 Cal.Rptr. 890, 583 P.2d 748].)" (*Williams* v. *Superior Court* (1989) 49 Cal.3d 736, 740 [263 Cal.Rptr. 503, 781 P.2d 537].) "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." (*Duren* v. *Missouri* (1979) 439 U.S. 357, 364 [58 L.Ed.2d 579, 99 S.Ct. 664]; see also *Bell, supra*, 49 Cal.3d at p. 525; *People* v. *Morales* (1989) 48 Cal.3d 527, 543 [257 Cal.Rptr. 64, 770 P.2d 244].) If a defendant demonstrates a prima facie case of systematic underrepresentation under this tripartite test, the burden shifts "to the state to come forward with either a more precise statistical showing that no constitutionally significant disparity existed or that there was a compelling justification for the procedure which results in the disparity in the jury pool." (*Harris, supra*, 36 Cal.3d at p. 50.)

c. *Application*

(1b) The first prong of the *Duren* test is clearly satisfied; Hispanics, or those with Spanish surnames, constitute a distinctive group for purposes of a fair cross-section analysis. (*Morales, supra*, 48 Cal.3d at p. 543.)

The second prong may be satisfied by showing "that the number of members of the cognizable group is not fair and reasonable in relation to the number of members in the relevant community." (*Bell, supra*, 49 Cal.3d at p. 526.) Working from defendant's most refined statistics, adult Hispanic citizens made up 16.3 percent of Kern County, whereas only 8.3 percent of those appearing for jury duty were Hispanic. Thus, there was an 8 percent absolute disparity and a 49 percent comparative disparity.[5/]

We have previously noted that "the [United States] Supreme Court has not yet spoken definitively on either the means by which disparity may be measured or the constitutional limit of permissible disparity." (*Bell, supra*, 49 Cal.3d at pp. 527-528,

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5. "The 'absolute disparity' test measures representativeness by the difference between the proportion of the population in the underrepresented category, and the proportion of those persons in the source or pool in the underrepresented category." (*Bell, supra,* at p. 527, fn. 14; see also Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) 65 Cal.L.Rev. 776, 789-790.) It is "obtained by subtracting the jury representation percentage from the community percentage." (*Morales, supra,* 48 Cal.3d at p. 544.)

The comparative disparity standard is obtained by the following formula:

$$\frac{A - B}{A} \times 100 = \text{the comparative disparity,}$$

where: A = the percentage of the community that makes up the cognizable group in question, here adult Hispanic citizens, and

B = the percentage of the jury venire which is composed of the cognizable group in question.

(See Kairys, *supra,* 65 Cal.L.Rev. at pp. 790-791.)

fns. omitted.)[6] As in Bell, however, we need not resolve this difficult line-drawing question because defendant fails to establish a prima facie case under *Duren*'s third prong by showing the disparity is caused by "systematic" exclusion of Hispanics from Kern County juries.

By basing his motion to quash on the expert statistical evidence given in the *Cantu*, *Robinson*, and *Streeter* cases, defendant sought to show a statistical disparity occurred over time and was thus the result of a "systematic exclusion" of Hispanics. As we recently explained in *Bell, supra*, however, such a showing is insufficient, standing alone, to make out a prima facie case of a Sixth Amendment violation. When, as here, "a county's jury selection criteria are neutral with respect to race, ethnicity, sex, and religion, more is required to shift the burden to the People. The defendant must identify some aspect of the manner in which those criteria are being applied that is: (1) the probable cause of the disparity, and (2) constitutionally impermissible." (*Bell, supra*, 49 Cal.3d at p. 524.) Evidence that "race/class *neutral* jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw" is insufficient to make out a prima facie case. (*Morales, supra*, 48 Cal.3d at p. 546, italics in original.)

Defendant claims he has satisfied this requirement in *Bell* (*supra*, 49 Cal.3d 502) by relying not only on the statistical disparity, but on the fact that at the time of defendant's trial, Kern County assembled its master jury list solely from the voter registration list. Not only does he argue this is the "probable source" of the disparity, he contends the practice is "constitutionally impermissible," citing *People* v. *Harris*,

6. Some courts and commentators have expressed the opinion that the comparative disparity approach is superior to the absolute disparity standard. (*Bell, supra,* at pp. 565-566, and cases cited [dis. opn. by Broussard, J.]; Kairys, *supra*, 65 Cal.L.Rev. at pp. 793-799.) This court, however, has declined to adopt one approach to the exclusion of the other. (*Bell, supra,* at p. 527, fn. 14.)

supra, 36 Cal.3d 36. Our concern here is with the latter requirement: because the county's juror selection procedures were facially neutral, has defendant shown that procedure is nevertheless "constitutionally impermissible" within the meaning of *Bell*?

There is some language in the lead opinion in *Harris* suggesting that sole reliance on voter registration lists in assembling the master jury list is constitutionally prohibited. We do not, however, read *Harris* so broadly. In that divided opinion, a three-justice plurality held the defendant made a prima facie showing of a fair cross-section violation based on a statistical showing of racial disparity and the fact that the county assembled its master jury list using only voter registration lists. (36 Cal.3d at p. 58 [plur. opn. by Broussard, J., joined by Bird, C. J., & Reynoso, J.].)Although the trial court did not find the defendant made a prima facie case — and thus the People were never asked to present any rebuttal evidence — the plurality reversed the judgment. Three other justices dissented on this point. (*Id.* at pp. 72 [dis. opn. by Mosk, J., joined by Richardson, J.], 75 [dis. opn. by Kaus, J.].)

In a pivotal separate opinion, Justice Grodin provided a reluctant fourth vote to reverse. He expressly agreed with the plurality that defendant made a prima facie case, despite relying on total population statistics. Justice Grodin further stated that "in light of published studies which point to the exclusive reliance upon voter registration lists as a likely source of racial and ethnic disparity in the composition of juries, I am prepared to say that defendant's showing should be regarded as sufficient to trigger further inquiry." (*Harris, supra*, 36 Cal.3d at p. 71 [conc. opn. by Grodin, J.].)

Significantly, he further explained that he "*would not reverse the judgment on that account.*" (*Harris, supra*, 36 Cal.3d at p. 71, italics added.) Because the People had no occasion to present rebuttal evidence, he opined the case should be remanded to allow them to do so. (*Id.* at pp. 71-72.) "Upon full consideration of the relevant evidence it might be concluded

that 'no disparity of constitutional significance exists,' or that 'even with the use of multiple sources and all other practical means, a certain level of disparity is unavoidable,' or that the underrepresentation which does exist is justified by a showing of overriding state interest." (*Id.* at p. 72, quoting plur. opn. at p. 59.) Justice Grodin then explained that although he preferred the remand option, there would be no disposition of the case were he to insist on that alternative. Finding this an "intolerable" result, and concluding that he "fundamentally" disagreed with the dissenting opinions, he reluctantly joined the plurality opinion's disposition to reverse. (*Ibid.*)

As is clear, Justice Grodin did not join the Harris plurality's far-reaching conclusion that sole reliance on voter registration lists was itself constitutionally prohibited.[7] Indeed, he twice stated his position that identification of that fact, coupled with an adequate statistical showing of racial disparity, merely established a prima facie case of a constitutional violation, and should not itself require reversal.

Since *Harris, supra*, 36 Cal.3d 36, however, this court has refined the procedure by which a criminal defendant can establish a prima facie case of a fair cross-section violation.

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7. The *Harris* plurality opinion is far from clear on this point as well. That opinion first noted our decision in *People v. Sirhan* (1972) 7 CAL.3d 710 [102 Cal.Rptr. 385, 497 P.2d 1121], in which we held that "[t]he use of voter registration lists as the sole source of jurors is not constitutionally invalid [citations], at least in the absence of a showing that the use of those lists resulted 'in the systematic exclusion of a "cognizable group or class of qualified citizens."'" (*Id.* at pp. 749-750.) Although the *Harris* plurality then suggested that the defendant was trying to make just such a showing, it did not overrule *Sirhan* on this point. It is thus arguable that *Harris* did not "hold" sole reliance on voter registration lists was itself impermissible, even with Justice Grodin's vote.

It appears, however, that the plurality's opinion has been interpreted as holding that sole reliance on voter registration lists is impermissible. (*Harris, supra*, 36 CAL.3d at pp. 72-73 [Mosk, J., dis.]; see also *United States* v. *Underwood* (N.D.Ala. 1985) 617 F.Supp. 713, 716; *Waller* v. *Butkovich* (M.D.N.C. 1984) 593 F.Supp. 942, 958.)

Unlike in *Harris*, a defendant attacking facially neutral procedures as the "probable cause" of the statistical disparity must now demonstrate that such procedures are either "constitutionally impermissible" or are being implemented in a constitutionally objectionable manner. (*Bell, supra*, 49 Cal.3d at p. 524.) As explained above, *Harris* does not constitute controlling authority for this latter point. Resort to other authority is similarly unhelpful to defendant's position.

We begin our analysis by noting that, at the time of defendant's trial, our state Legislature permitted sole reliance on voter registration lists to assemble the master jury list. As explained below, former Code of Civil Procedure section 204.7 stated that source lists for jurors "shall include those who are registered voters." The section also provided that the list should be supplemented from lists from the Department of Motor Vehicles (DMV) in those counties where such supplementation was practical and would not entail "significant cost." The negative implication of this statutory language was that sole reliance on voter registration lists was permissible where supplementation was impractical or costly.

(4) We presume this statute was constitutional. "'In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act. [Citations.]'" (*County of Sonoma* v. *State Energy Resources Conservation etc. Com.* (1985) 40 Cal.3d 361, 368 [220 Cal.Rptr. 114, 708 P.2d 693], quoting *California Housing Finance Agency* v. *Elliot* (1976) 17 Cal.3d 575, 594 [131 Cal.Rptr. 361, 551 P.2d 1193].)

(1c) Our past decisions, and those of other courts, are in accord. As discussed, *ante*, at page 494 footnote 7, we held in 1972 that sole reliance on voter registration lists was not itself constitutionally invalid. (*Sirhan, supra*, 7 Cal.3d at pp. 749-750.) Moreover, the federal circuits are unanimous on this point. Interpreting the Jury Selection and Service Act of 1968

(28 U.S.C. §§ 1861-1867), circuit courts of appeal have routinely held sole reliance on voter registration lists does not violate the fair cross-section rule absent some evidence of active discrimination.

United States v. *Cecil* (4th Cir. 1988) 836 F.2d 1431 (cert. den. (1988) 487 U.S. 1205 [101 L.Ed.2d 883, 108 S.Ct. 2846]), is illustrative. In that case, the United States Court of Appeals for the Fourth Circuit opined that sole use of voter registration lists "cannot be described 'as "systematically" excluding classes that do not register in proportion to their numbers'; it is a process that comports with the 'need for efficient jury selection' even though it may not 'perfectly reflect population.' Nor does it follow that the voter registration lists do not satisfy the fair cross-section ... [requirement] simply because ... members of one group neglected to register in the same proportion as was their share in the overall population. the Constitution and the [federal] statute do not require such perfection. It is sufficient that the system adopted provides a fair cross-section and we find both common sense and precedent establish that if the voter registration lists do this they are not tainted by some affirmative form of discrimination." (*Id.* at pp. 1448-1449; see generally *id.* at pp. 1444-1451, and cases cited; Annot., Construction and Application of Provisions of Jury Selection and Service Act of 1968 (28 USCS §§ 1861-1867) Governing Plans for, and Manner of, Selecting Federal Grand and Petit Jurors (1973) 17 A.L.R.Fed. 590, 608, § 7[a] and cases cited.)

Significantly, the rule laid down in *Sirhan, supra*, 7 Cal.3d at pages 749-750, as well as the complementary rule of law in numerous federal cases, existed before and during defendant's trial. Former Code of Civil Procedure section 204.7 was also in force at that time. In light of these persuasive authorities, we conclude defendant fails to demonstrate the county's race neutral procedures for using voter registration lists to assemble the county's master jury list was constitutionally impermissible and, accordingly, we conclude the trial court correctly denied the

motion to quash.[8]

2. *Former Code of Civil Procedure Section 204.7*

(5) In conjunction with his pretrial challenge to the composition of the jury venire, defendant also claimed the master jury list was assembled in violation of former Code of Civil Procedure section 204.7, at the time a relatively new statute. (Stats. 1980, ch. 81, § 35, p. 207, eff. July 1, 1981.)[9] The evidence produced in support of the motion showed that at the time of his 1981 trial, Kern County relied solely on voter registration rolls to compile its jury lists. Although an attempt was made to incorporate and integrate the names of those holding driver's licenses and identification cards from the DMV, the county intended to complete this project only in time to select the 1982 master jury list. The jury list was assembled once a year and the list in use at the time of defendant's motion (November 1981) had been compiled the previous year. For Kern County to expand and use multiple source lists any sooner would have cost between $15,000 and $40,000 for a computer program to eliminate duplicate names (in order to maintain the randomness of the selection procedure).

At the time of defendant's trial, former Code of Civil Procedure section 204.7 provided that "(a) Source lists of jurors

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8. The trial court apparently denied defendant's motion to quash because his supporting evidence failed to take account of the number of illegal aliens of Hispanic descent living in Kern County. As discussed *ante*, at page 490, footnote 4, a defendant need not present such refined statistics to establish a prima facie case. Albeit for the wrong reason, the trial court reached the correct result.

9. Former Code of Civil Procedure section 204.7 has since been repealed. (Stats. 1988, ch. 1245, § 1.) It has been supplanted by section 197 of the same code, which states that a master jury list assembled from lists of registered voters and driver's license holders, "when substantially purged of duplicate names, shall be considered inclusive of a representative cross section of the population."

shall identify persons who reside in the county, and who are 18 years of age or older, shall include those who are registered voters, and to the extent that systems for producing jury lists can be *practically modified, without significant cost*, shall also include those who have been licensed or issued an identification card pursuant to Article 3 ... and Article 5 ... of Chapter 1 of Division 6 of the Vehicle Code. Qualified jury lists and master jury lists derived from the source lists shall be prepared so as to reasonably minimize duplication of names." (Italics added.)

The trial court denied defendant's motion at a November 1981 hearing, concluding that the section did not become effective until January 1982, "if then." In addition, the court specifically declined to make a finding on the financial feasibility of the immediate use of multiple source lists. Although the trial court did not explain its decision regarding the effective date of the newly enacted statute, it appears the court believed that because Kern County assembled its master jury list only once each year and the list for 1981 had already been chosen, the new statute would affect only. the master jury list for 1982, which would supplant the previous year's jury list in January 1982.

The trial court did not cite any authority for its interpretation of the former code section, making it difficult to evaluate the correctness of its ruling. However, even assuming arguendo the trial court erred, defendant cannot prevail. As the evidence below made clear, Kern County was, at the time defendant made his motion, in the process of complying with the statutory requirement to integrate DMV lists into the master jury list. Recognizing that mandating overnight changes was unwise, the Legislature only required that "systems for producing jury lists" be modified to include DMV lists if such changes could be done "without significant cost." Because the record shows the cost of immediate compliance would have been several thousand dollars, and that compliance would occur shortly, we conclude the motion was properly denied because the record shows the master jury list could not be "practically modified, without

significant cost ...." (Former Code Civ. Proc., § 204.7.)

3. *Wheeler Error*

(6a) During voir dire, all but four Spanish surnamed persons were excused for cause by either the prosecution or the defense. When the remaining four were peremptorily challenged by the prosecutor, defendant objected, claiming the prosecutor was exercising his peremptory challenges to improperly exclude Spanish surnamed persons from the jury. (*People* v. *Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748].) The trial court denied the motion, finding defendant failed to demonstrate a prima facie showing that the prosecutor was relying on group rather than specific bias. We agree the court properly denied the motion.

(7) It is now well established that "peremptory challenges may not be used to exclude from a jury, solely because of a presumed 'group bias,' all or most members of an identifiable group of citizens distinguished on racial, religious, ethnic, or similar grounds." (*People* v. *Snow* (1987) 44 Cal.3d 216, 222 [242 Cal.Rptr. 477, 746 P.2d 452].) Such improper exercise of peremptory challenges violates article I, section 16, of the California Constitution (*People* v. *Turner* (1986) 42 Cal.3d 711, 716 [230 Cal.Rptr. 656, 726 P.2d 102]; *Wheeler, supra*, 22 Cal.3d at pp. 276-277), as well as the equal protection clause of the United States Constitution. (*Batson* v. *Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712].)

"If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood

that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler, supra*, 22 Cal.3d at p. 280; see also *Snow, supra*, 44 Cal.3d at p. 222.) If the trial court finds the moving party has made a prima facie case, the burden shifts to the opponent to explain its peremptory challenges. (*People* v. *Johnson* (1989) 47 Cal.3d 1194, 1216 [255 Cal.Rptr. 569, 767 P.2d 1047].)

(6b) Defendant clearly raised the issue in timely fashion and made as complete a record as possible. Moreover, contrary to the People's argument, defendant's reliance on Spanish surnamed persons as a category of excluded jurors is permissible. (See *Morales, supra*, 48 Cal.3d at p. 543.) We conclude, however, that the trial court properly found defendant failed to demonstrate "from all the circumstances of the case" a "strong likelihood" that the prosecutor's use of peremptory challenges to excuse the four Spanish surnamed jurors was based on group, rather than specific, bias. Because defendant thus failed to make a prima facie showing of a constitutional violation, the prosecutor's burden of justification never arose.

An examination of the voir dire proceedings supports this conclusion. Mrs. Sosa was the first Spanish surnamed person peremptorily challenged by the prosecutor. She stated she was a cook for the Child Development Center and that her husband was director of maintenance and transportation at a local school. She had three adult children and had lived in Kern County for eleven years. When asked about the death penalty, she replied, "That is kind of scary" and that she was "absolutely" opposed to the death penalty on religious grounds. On later questioning, she was asked whether she would impose the death penalty in a proper case under proper instructions; she said, "Yes, I guess."

Mr. Arrambide was questioned shortly after Mrs. Sosa. He was a labor contractor, married, and had five children. He had lived in Kern County since 1948 and did not read a newspaper. He seemed distracted because he had lost a job that day due to his jury duty and was concerned that he would lose more jobs. He operated five work crews and explained that "if I am not

there, well, they say that guy is not interested in the job .... Some farmers understand, but some don't." Later, when asked whether he would lose many jobs by serving on defendant's jury, he admitted he did not know. When asked about the death penalty, Mr. Arrambide stated his belief that only God could take a man's life, but that he could vote to impose the death penalty. Later, he said he could not, and appeared confused by the questioning. There was some suggestion of a language problem.

Defendant first raised the Wheeler issue after Sosa and Arrambide were excused. The trial court denied the motion, stating, "I certainly don't think there is at this particular point an indication that there is an intention to rid this jury of all Spanish surnamed individuals. [¶] I tell you now that I do not know the reason for the excusing of [Mrs.] Sosa but it's very obvious why Mr. Arrambide was excused. Motion is denied at this point. But I want to find that there is no obvious reason for the excusing of Mrs. Sosa."

A few days later, Mr. Lara was questioned. A mechanic, Lara was married, had no children, and had lived in the county for 19 years. He initially stated he would always choose life over death and was absolutely opposed to the death penalty. The prosecutor interposed a challenge for cause which was ultimately denied after Lara was questioned by defense counsel. Lara admitted he could conceive of a crime for which death might be appropriate and, after some pointed questioning, he eventually conceded he could vote for the death penalty if he were retained on the jury.

After Mr. Lara was questioned, counsel for both defendant and Cebreros announced they were satisfied with the panel. The prosecutor then exercised one of his remaining peremptory challenges to excuse Juror Lara. Defendant renewed his Wheeler motion but the trial court again denied it, stating, "I am keeping [track] of it and I made a finding that I couldn't see any reason with Mrs. Sosa. But with Mr. Lara, it's very obvious when I first asked him about the death penalty he indicated he

was opposed to it. I don't think [the prosecutor's challenge] was done for any racist reason whatsoever and the court will make such a finding." Counsel argued briefly but to no avail that although Mr. Lara initially expressed personal opposition to the death penalty, his later responses on voir dire showed he had modified his position in that regard.

Mr. Mercado was the final Spanish surnamed person on the panel. At the beginning of the voir dire, the trial judge admitted that he knew Mr. Mercado due to a prior association between the judge's wife and Mercado's mother. Mr. Mercado affirmed that the connection would not affect his ability to be impartial.

Mr. Mercado was a high school math teacher, having graduated from Fresno State. His wife was a junior high school teacher and they had one child, then two years old. He stated he read the local paper regularly but not thoroughly, and had no recollection of defendant's case, although he knew the brother of one of the witnesses (Glen Blackford). He stated he was in favor of the death penalty but could keep an open mind. Although his cousin worked for the California Highway Patrol and he had a few friends who were deputy sheriffs, he claimed that he would not accord a law enforcement officer's testimony undue weight. He admitted that while sitting as an alternate, he might be thinking about his high school baseball team because they were due to begin preconditioning, but he would probably be able to set those thoughts aside.

Mr. Mercado then admitted he had suffered two arrests in his life. In the first, he was arrested for"grand theft auto" when he was 18 years old. The matter was reduced to misdemeanor joyriding and he received probation. In the second, he recounted that while in college, he and a Black friend were confronted by eight college football players. The players made some racially derogatory remarks and a fight ensued. When the police arrived, the eight players had fled but police arrested Mercado's friend for being drunk in public. When Mercado attempted to intervene by offering to drive his friend home, he was arrested for obstructing an officer in the performance of his

duties. The charges were later dropped.

After the prosecutor used a peremptory challenge to remove Mr. Mercado, the fourth and final Spanish surnamed juror, defendant renewed his Wheeler motion a second time. The trial judge stated "Gentlemen, this young man, and I have known [Mercado] a long time. I was shocked to hear about his run ins with the police. I was unaware of it. I think the district attorney has ample grounds under those circumstances."

Defendant first contends that the fact that the prosecutor struck all four of the remaining Spanish surnamed potential jurors from the panel demonstrates a strong likelihood of an impermissible motivation. Although the removal of all members of a certain group may give rise to an inference of impropriety (*Wheeler, supra*, 22 Cal.3d at p. 280), we cannot say this factor was dispositive on this record. It is clear the trial court was "aware of [its] duty under *Wheeler* to be sensitive to the manner in which peremptory challenges were used." (*Johnson, supra*, 47 Cal.3d at p. 1221.) After carefully scrutinizing the voir dire proceedings, the trial court — clearly aware the prosecutor had removed the remaining Spanish surnamed venire persons — held defendant failed to demonstrate a strong likelihood based on "all the circumstances of the case" that the prosecutor's exercise of his peremptory challenges were based on group bias.

We reiterate that ruling on Wheeler motions "'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors.' [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim ...." (*Wheeler, supra*, 22 Cal.3d at p. 281, quoting Kuhn, Jury Discrimination: The Next Phase (1968) 41 So. Cal.L.Rev. 235, 295, fn. 5; see also *Johnson, supra*, 47

Cal.3d at pp. 1219-1222.) Applying this standard of giving considerable deference to the determination of the trial court, "we see no good reason to second-guess [the trial court's] factual determination" (*Johnson, supra*, at p. 1221) that the prosecutor was not motivated by bias against Hispanics.

(8) Defendant also contends the trial court should have found he made a prima facie showing because aside from their ethnicity, the four excused jurors were otherwise "as heterogeneous as the community as a whole." (*Wheeler, supra*, 22 Cal.3d at p. 280.) While this fact may, under some circumstances, support a finding of a prima facie case, comparisons between jurors is not often a fruitful exercise. "[T]he very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*Johnson, supra*, 47 Cal.3d at p. 1221.) Such a comparison "is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected." (*Ibid.*)

Although defendant argues the prosecutor's voir dire of the jurors in question was "superficial if not exactly desultory" (see *Wheeler, supra*, 22 Cal.3d at p.281), the record does not support this assertion; our independent examination of the record does not reveal the voir dire of the four potential jurors was either limited or desultory, or was in any way different from the other jurors on the panel.

Defendant thus fails to convince us that our traditional deference to a trial court's ruling on a Wheeler motion is inappropriate. **(9)**(See fn.10.) We conclude the trial court properly found defendant failed to make a prima facie showing of a strong likelihood that the prosecutor's challenges were motivated by group, rather than specific, bias.[10/]

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10. In supplemental briefing, defendant claims the prosecutor's use of peremptory challenges violated defendant's right to equal protection of the laws. (See *Batson* v. *Kentucky, supra*, 476 U.S. 79.) Although the rule in *Batson* vindicates a federal constitutional right, whereas *Wheeler* addressees a state constitutional concern, the procedure for establishing a prima facie case under both cases is similar. (See *Johnson, supra*, 47 Cal.3d at p. 1216 [jointly analyzing the issue under both cases].) For the reasons discussed above, we conclude defendant fails to show the "facts and other relevant circumstances raise an inference that the prosecutor used [his peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson, supra*, at p. 96 [90. L.Ed.2d at pp. 87-89].)

4. *Witherspoon/Witt Error*

During routine questioning on voir dire, venireman Giangregorio volunteered that he did not believe in capital punishment. Later, when questioned about that topic by the trial judge, the following colloquy occurred:

"Q: How do you feel about the death penalty?

"A: I am against it, your Honor.

"Q: Are you against it in every case?

"A: Every instance. I do not believe in it." The prosecutor's motion to exclude for cause was thereafter granted over a defense objection.

(10) Defendant now contends Giangregorio's excusal violated the precepts laid down in *Witherspoon* v. *Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] (*Witherspoon*). As he recognizes, however, the high court limited *Witherspoon*, establishing a less stringent standard, in part because of the modern trend against permitting a capital jury to act with unfettered discretion. (*Wainwright* v. *Witt* (1985) 469 U.S. 412, 422 [83 L.Ed.2d 841, 850, 105 S.Ct. 844] (*Witt*).) *Witt* requires that the trial court determine "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at p. 424 [83 L.Ed.2d at pp. 851-852].) "Under *Witt*, therefore, our duty is to 'examine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would

"substantially impair the performance of his duties ..." was fairly supported by the record.'" (*People* v. *Miranda* (1987) 44 Cal.3d 57, 94 [241 Cal.Rptr. 594, 744 P.2d 1127], quoting *Darden* v. *Wainwright* (1986) 477 U.S. 168, 176 [91 L.Ed.2d at p. 154].)

Defendant first contends we should retain the stricter *Witherspoon* standard as a matter of state constitutional law. (See Cal. Const., art. I, § 16 [right to trial by jury].) However, we have already adopted the *Witt* standard, because it "'make[s] good sense, and because California courts have generally followed the teachings of the high court in determining when a prospective juror properly may be excused for cause because of his views regarding capital punishment ....'" (*People* v. *Guzman* (1988) 45 Cal.3d 915, 955 [248 Cal.Rptr. 467, 755 P.2d 917], quoting *People* v. *Ghent* (1987) 43 Cal.3d 739, 767 [239 Cal.Rptr. 82, 739 P.2d 1250].)[11/]

He next argues that Giangregorio's excusal was improper even under the *Witt* standard. Giangregorio's expressed antipathy to the death penalty in "every instance," however, would undoubtedly"substantially impair the performance of his duties as a juror ...." (*Witt, supra*, 469 U.S. at p. 424 [83 L.Ed.2d at p. 851].) Although defendant submits the trial court

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11. Defendant contends that adoption of the *Witt* standard over the *Witherspoon* standard does not comport with this state's expressed preference for "strict standards in death penalty cases." (See, e.g., *People* v. *Bigelow* (1984) 37 Cal.3d 731, 743, fn. 7 [209 Cal.Rptr. 328, 691 P.2d 994, 64 A.L.R. 4th 723].) We agree with the high court, however, that "there is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries. *Witherspoon* is not grounded in the Eight Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." (*Witt, supra,* 469 U.S. at p. 423 [83 L.Ed.2d at p. 851] quoted with approval in *People* v. *Howard* (1988) 44 Cal.3d 375, 417 [243 Cal.Rptr. 842, 749 P.2d 279[.)

should have explained to Giangregorio that it was his civic duty to set aside his personal feelings and obey the law, we have previously rejected that notion, finding nothing in Witherspoon that obligates a trial court to so instruct a juror. (*Miranda, supra*, 44 Cal.3d at p. 96.)

We conclude prospective juror Giangregorio was properly excused from the jury.[12/]

B. *Guilt Phase Issues*

1. *Exclusion of Expert Testimony Regarding Eyewitness Identification*

(11a) At trial, defendant offered the testimony of Dr. Elizabeth Loftus, an expert on eyewitness identifications. Dr. Loftus would have testified to the following:[13/] To provide a basis for her expert opinion, she read the police reports in the case as well as the transcript of the preliminary examination. In addition, she viewed the photographic lineup and discussed the case with defense counsel. Based on this information, she determined the following factors could have influenced the eyewitness identification in this case: (1) stress or fear; (2) violence; (3) weapon focus; (4) retrograde amnesia; (5) ingestion of drugs or alcohol; and (6) a photo-biased identification. She did not intend to give an opinion as to

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12. Although defendant originally challenged the excusal of two other venire persons (Shepard and Boston) in addition to Giangregorio, he fails to mention that these two jurors in his supplemental briefs and we assume he is conceding that, in light of the different standard established in *Will,* the record no longer supports his claims that their excusal was improper. Our review of the record supports such a determination.

13. Dr. Loftus testified outside the jury's presence at defendant's first trial. The parties stipulated that the transcript of this testimony, together with a copy of the prosecutor's legal memorandum on this point, could be considered by the trial court before ruling on the admissibility of Dr. Loftus's testimony in defendant's second trial.

whether any particular identification was accurate but only that these six factors are known to affect the accuracy of eyewitness identifications in general. Moreover, she opined that the information she would provide was beyond the common experience of most jurors and that her testimony could be of assistance to the jury.

The prosecutor objected to Dr. Loftus's proposed testimony, contending that the accuracy of eyewitness identifications was a matter of common sense for the jury, that Dr. Loftus could not testify as to the accuracy of any particular identification, and that cross-examination coupled with appropriate jury instructions would form an adequate basis from which the jury could decide whether or not to rely on Boender's identification of defendant. In addition, the prosecutor cited several cases in which the type of expert testimony the defense offered had been excluded. The trial court, although finding Dr. Loftus qualified to testify as an expert and that her testimony would not consume an undue amount of time, sustained the prosecution's objection.

As both defendant and the People acknowledge, the resolution of this issue is controlled by *People* v. *McDonald* (1984) 37 Cal.3d 351 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011], filed after defendant's trial. McDonald involved the murder of Jose Esparza on a public sidewalk, viewed from varying distances by seven witnesses who identified McDonald as the killer. McDonald offered the testimony of Dr. Shomer, who "proposed to inform the jury of various psychological factors that may affect the reliability of eyewitness identification, and to 'help to counter some common misconceptions' about the process." (*Id.* at p. 361.) Specifically, Dr. Shomer would have testified that the following factors affected the reliability of eyewitness identifications: "the observer's state of mind, his expectations, his focus of attention at the time, the suddenness of the incident, the stressfulness of the situation, and the differences in the race and/or age of the observer and the observed." (*Ibid.*) Following a line of appellate

decisions that upheld the exclusion of such evidence,[14] the trial court in McDonald excluded Dr. Shomer's testimony. The defendant was convicted of murder and sentenced to death.

We reversed. **(12)** "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*McDonald, supra*, 37 Cal.3d at p. 377.) However, exclusion of such evidence requires reversal only if it results in a miscarriage of justice. (*People* v. *Brown* (1985) 40 Cal.3d 512, 526-527 [220 Cal.Rptr. 637, 709 P.2d 440]; *McDonald, supra*, at p. 376; see also *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

(11b) Although an appellate court should, in the usual case, defer to a trial court's decision. admitting or excluding expert testimony (*McDonald, supra*, 37 Cal.3d at p. 377), the trial in defendant's case took place prior to our decision in *McDonald* and the trial court took no guidance from the reasoning therein. Even assuming arguendo the trial court erred in excluding the proffered expert testimony, however, we find the error was harmless.

We begin by noting that several of the critical factors identified in McDonald are present in this case. Boender's identification of defendant was indisputably a "key element" of the People's case. Also, there is no dispute that Dr. Loftus was a qualified expert on the subject of eyewitness identifications.

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14. The trial court in *McDonald* cited four cases in support of its decision: *People* v. *Johnson* (1974) 38 Cal.App.3d 1 [112 Cal.Rptr. 384]; *People* v. *Guzman* (1975) 47 Cal.App.3d 380 [121 Cal.Rptr. 69]; *People* v. *Brooks* (1975) 51 Cal.App.3d 602 [124 Cal.Rptr. 492]; and *People* v. *Bradley* (1981) 115 Cal.App.3d 744 [171 Cal.Rptr. 487]. (*McDonald, supra*, 37 Cal.3d at p. 362 & fn. 8.) The trial court in the instant case also relied on some of these cases in excluding Dr. Loftus's testimony.

We thus must examine whether Boender's identification was "substantially corroborated" such that it had "independent reliability." Once again, *McDonald* is instructive.

In *McDonald, supra*, 37 Cal.3d 351, no evidence linked the defendant to the crime other than the eyewitness identifications. The eyewitnesses in *McDonald* were equivocal, voicing various degrees of certainty, with one actually asserting that the defendant was definitely not the killer. Finally, the defendant had a strong alibi defense: several witnesses testified that he was in Alabama on the day of the killing and their testimony was supported by physical evidence in the form of dated postcards and phone bills. The identifications therefore were not corroborated by evidence giving them independent reliability.

In the present case, by contrast, Boender was positive that defendant was one of the two assailants and his identification was bolstered by (1) his recognition of defendant from the botched robbery attempt two days earlier; (2) Maxwell's statement to police, which dovetailed with Boender's description of the crimes and gave defendant a motive to kill Boender; and (3) Maxwell's descriptions of defendant and Cebreros, which matched Boender's descriptions of the assailants given to police the day after Allen's murder. Although Maxwell was admittedly not the most veracious witness, we cannot agree with defendant that her testimony must be wholly disregarded. To the extent Maxwell's testimony was consistent with Boender's version of events, it provides some corroboration for Boender's eyewitness identification of defendant.

Moreover, unlike in McDonald, physical evidence linked defendant to the crime. The baggie of marijuana found in Cebreros's possession was identical to that taken from Boender's apartment. In addition, the gun found in his possession was similar to the one that Boender described as having been wielded by defendant. Finally, the roll of duct tape bore defendant's fingerprints, thus supporting Maxwell's story that

defendant planned to use it to bind Boender during the January 21st robbery attempt. Although none of these items points unerringly towards defendant's guilt, they constitute links in the chain of evidence against him and thus provide some corroboration of Boender's identification of defendant as the guilty party.

Due to the strength of the evidence corroborating Boender's eyewitness identification of defendant, we cannot conclude the trial court's exclusion of his proffered expert evidence resulted in a miscarriage of justice. (*McDonald, supra*, 37 Cal.3d at p. 376.) Even assuming error, it was harmless.

(13a) In a related claim, defendant contends the trial court abused its discretion when, during voir dire, it sustained the prosecutor's objection to defense questions that sought to elicit the opinions of potential jurors concerning the effects of stress on perception. Defendant argues that these questions would have demonstrated that the information Dr. Loftus sought to impart was not within the common knowledge of the jury, thereby undercutting a potential justification for excluding her testimony.

(14) The purpose of questioning at voir dire, however, is to assist the attorneys in the exercise of their peremptory challenges, not to provide foundational support for their evidentiary motions. "[C]ounsel should be allowed to ask questions reasonably designed to assist in the *intelligent exercise of peremptory challenges* whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause." (*People* v. *Williams* (1981) 29 Cal.3d 392, 407 [174 Cal.Rptr. 317, 628 P.2d 869], italics added.) (13b) Because the challenged questions at voir dire were not related to aiding the exercise of peremptory challenges but instead were intended to support defendant's position on an evidentiary question, no abuse of discretion occurred.

Defendant apparently recognizes the weakness of his argument by suggesting that responses to his voir dire questions would have helped him decide which jurors to challenge by

exposing whether they were aware of the information Dr. Loftus would have offered. Although defendant thus claims the questions would have assisted in the exercise of his peremptory challenges, he is basically asserting that if the trial court excluded Dr. Loftus's testimony on the ground that it was within the common experience of the jury, then he was entitled to prove through questioning of the jurors that the trial court's assumption was incorrect. As we have explained, this is not a proper subject of questioning on voir dire.

2. *Boender's Identification of Cebreros*

The day after the murder, police questioned Boender at the hospital. He described the larger of his assailants as over six feet tall, weighing over two hundred pounds, with dark hair thinning on top and combed straight back. Boender also noticed the man carried his arms noticeably away from his body and looked like a "biker." This description was very similar to Maxwell's description of Cebreros, given to police the night before. After Cebreros was arrested, police displayed a stack of photographs to Boender, who, upon seeing the picture of Cebreros, exclaimed, "This is the big guy; I'm sure of it." Maxwell also identified Cebreros from a photographic lineup. Cebreros is six feet, five inches tall, weighs two hundred and twenty pounds, and has hair as described by Boender. After Cebreros was arrested, Boender identified defendant from a separate photographic lineup.

Defendant moved to suppress Boender's out-of-court identification of him, claiming the circumstances under which Boender selected his photograph were unduly suggestive. Cebreros made a similar motion as to Boender's identification of him. The trial court denied both motions, although it noted that the photographic array that included Cebreros left "a great deal to be desired" because his picture was the only one in the display that matched Boender's description of the larger assailant. The court stated, however, that, after considering all

the facts and circumstances of the case, it could not conclude that there was "a very substantial likelihood of irreparable misidentification." (*Simmons* v. *United States* (1968) 390 U.S. 377, 384 [19 L.Ed.2d 1247, 1253, 88 S.Ct. 967].)

(15a) Defendant now attacks the validity of the pretrial identification of Cebreros, arguing that because other evidence linked the two men in the commission of the crimes, the prosecution was able to unfairly bolster its case against defendant by using Boender's questionable identification of Cebreros. Defendant's claim fails at the threshold because it does not appear he joined in Cebreros's motion to suppress in the trial court or otherwise objected to the introduction of Boender's identification of Cebreros. (Evid. Code, § 353.) Because the alleged flaw in Cebreros's photographic lineup was that his picture was the only one that matched the witnesses' description, defendant's own motion to suppress cannot be fairly read to encompass the theory on which Cebreros's motion was made.

Even assuming the issue was properly preserved for appeal, reversal is not required. **(16)** "[A] violation of due process occurs if a pretrial identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' [Citations.] 'Whether due process has been violated depends on "the totality of the circumstances" surrounding the confrontation. [Citation.]' The burden is on the defendant to show that the identification procedure resulted in such unfairness that it abridged his rights to due process. [Citation.]" (*People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 12 [179 Cal.Rptr. 249]; see also *People* v. *Blair* (1979) 25 Cal.3d 640, 659 [159 Cal.Rptr. 818 [602 P.2d 738].)

(17) "The factors to be considered in determining whether a lineup is impermissibly suggestive include the opportunity of the witness to view the criminal at the scene of the crime, the witness' degree of attention, the accuracy of the prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the

confrontation, as well as the suggestiveness of the procedure employed. (*Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114.)" (*Sequeira, supra,* 126 Cal.App.3d at pp. 12-13.)

(15b) In this case, Boender testified he clearly viewed his assailants and he focused on his attackers' faces in order to identify them if he survived the attack. He was certain of his identification of Cebreros, who matched both his and Maxwell's descriptions of the larger of the two assailants. Only two days passed between the crime and Boender's selection of Cebreros's picture from the photographic array. Although the Cebreros photographic array was somewhat suggestive, we agree with the trial court that the totality of the circumstances does not demonstrate that there was "a very substantial likelihood of irreparable misidentification." (*Simmons* v. *United States, supra*, 390 U.S. at p. 384 [19 L.Ed.2d at p. 1253].)

3. *Felony-murder Instructions*

The People presented the jury with six potential first degree murder theories. In addition to being instructed that it should return a verdict of first degree murder if it found defendant premeditated and deliberated the killing, or killed during a robbery, the jury was also instructed that it could return a verdict of first degree murder if it found the murder was committed during a burglary in which defendant entered Boender's home with the intent to (1) steal, (2) commit an assault, (3) falsely imprison the victims, or (4) dissuade the victims from testifying.

(18a) Defendant correctly contends, and the People now concede, that it was error to instruct the jury that it might convict of first degree murder if it found the killing occurred during a burglary in which defendant's intent was to commit an assault. "In [*People* v.] *Ireland* [(1969) 70 Cal.2d 522 [75 Cal.Rptr. 188 (450 P.2d 580, 40 A.L.R.3d 1323)], we rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second

degree felony-murder instruction. We conclude that the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation." (*People* v. *Wilson* (1969) 1 Cal.3d 431, 441 [82 Cal.Rptr. 494, 462 P.2d 22].) **(19)** We thus concluded that "a burglary based on intent to assault ... cannot support a felony-murder instruction." (*Ibid.*; see also *People* v. *Smith* (1984) 35 Cal.3d 798, 804 [201 Cal.Rptr. 311, 678 P.2d 886].)

(18b) Although the instruction was erroneous, we agree with the People that the error did not prejudice defendant. **(20)** The jury was presented with five legally permissible theories of guilt and one legally impermissible theory. In such circumstances, the applicable rule on appeal is clear: reversal is required only if the reviewing court cannot determine from the record on which theory the jury relied. (*People* v. *Green* (1980) 27 Cal.3d 1, 69 [164 Cal.Rptr. 1, 609 P.2d 468].) Two cases illustrate this point.

In *People* v. *Ainsworth* (1988) 45 Cal.3d 984 [248 Cal.Rptr. 568, 755 P.2d 1017], the jury was instructed on at least three theories of first degree murder: premeditation, robbery-felony-murder, and rape-felony-murder. (*Id.* at p. 1015 & fn. 16.) The defendant contended there was insufficient evidence to support the instructions on premeditation and rape-felony-murder and invoked the Green rule in urging that we reverse. He conceded, however, that there was sufficient evidence to support the robbery-felony-murder theory and, significantly, the jury sustained a robbery-murder special-circumstance allegation. Thus, we were "able to determine from the record — specifically, the jury's finding of a robbery special circumstance — that the jurors agreed on that theory at least in reaching their verdict." (*Id.* at p. 1015.) Because the first degree murder verdict was sustainable on the theory that the defendant killed during the commission of a robbery, we affirmed.

People v. *Boyd* (1985) 38 Cal.3d 762 [215 Cal.Rptr. 1, 700 P.2d 782] is in accord. In *Boyd*, the jury was presented with alternate theories of murder: felony murder and premeditation. Although the defendant argued there was insufficient evidence to justify an instruction on premeditation (*id.* at p. 769), we concluded any error was harmless, reasoning that "the jury which found defendant guilty of first degree murder simultaneously returned a verdict finding as a special circumstance that defendant committed that murder during the commission of attempted robbery. Those findings make it clear that whatever the jurors thought about premeditation, they agreed upon all of the elements necessary for a verdict of first degree murder based on a felony-murder theory." (*Id.* at p. 770.)

(18c) In the instant case, the jury was presented with one legally objectionable theory of first degree murder and several permissible theories. Pursuant to other, properly given instructions, the jury found beyond a reasonable doubt that defendant committed a robbery and that he was guilty of the robbery-felony-murder special circumstance. As in *Ainsworth, supra*, 45 Cal.3d 984, and *Boyd, supra*, 38 Cal.3d 762, we can conclude that, at the very least, the jury reached its verdict of first degree murder under one legally proper theory. Under such circumstances, there is no miscarriage of justice under article VI, section 13 of the state Constitution and reversal is not required. (Cf. *People* v. *Lee* (1987) 43 Cal.3d 666, 675, fn. 1 [238 Cal.Rptr. 406, 738 P.2d 752].)

4. *Accomplice Instructions*

The trial court also read to the jury the standard instructions defining accomplices and detailing the corroboration requirement of section 1111. (See CALJIC Nos. 3.10-3.12.) It then instructed that if anyone was guilty of the January 21 robbery attempt, then Brenda Maxwell was an accomplice as a matter of law (CALJIC No. 3.16) and that the testimony of accomplices should be viewed with distrust (CALJIC No. 3.18).

As to the January 23 crimes (i.e., the murder of Allen, the attempted murder of Boender, the robbery and the burglary), the jury was instructed that it must determine whether Maxwell was an accomplice and that defendant had the burden of proving that fact by a preponderance of the evidence.

(21a) Defendant argues Maxwell was an accomplice to all the crimes and that the trial court erred by leaving to the jury the question of whether she was an accomplice for the January 23 crimes. We disagree. **(22)** When the evidence concerning whether a witness was an accomplice to a crime is undisputed, it is a question of law for the trial judge to decide. (*People* v. *Hoover* (1974) 12 Cal.3d 875, 880 [117 Cal.Rptr. 672, 528 P.2d 760].) However, "if the facts are disputed or susceptible of different inferences, the question whether the witness is an accomplice should be submitted to the jury." (*People* v. *Mayberry* (1975) 15 Cal.3d 143, 159 [125 Cal.Rptr. 745, 542 P.2d 1337].) **(21b)** Here, the evidence that Maxwell was an accomplice to the January 23 crimes was not strong. although defendant argues the bungled robbery attempt two days earlier provided her with a motive to commit the January 23 crimes, the most that may be said is that the material facts were in dispute as to whether Maxwell was an accomplice to those crimes. The trial judge thus properly submitted the matter to the jury.[15]

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15. The cases cited by defendant are not on point. In *People* v. *Dail* (1943) 22 Al.2d 642 [140 P.2d 828], the trial court erroneously instructed the jury that the credibility of accomplice witnesses should be judged by the same standard as other witnesses. (*Id.* at p. 656.) By contrast, the trial court here properly instructed the jury that the testimony of an accomplice must be viewed with distrust and must be corroborated. In *People* v. *Robinson* (9164) 61 Cal.2d 373 [38 Cal.Rptr. 890, 392 P.2d 970], also cited by defendant, we reversed a conviction where, among other things, the trial judge erroneously left to the jury the determination of whether the witness was an accomplice when there was overwhelming evidence of that fact. (*Id.* at pp. 694-696.) As explained *ante*, the evidence showing Maxwell was an accomplice in the January 23 crimes was not strong. Hence, the question properly was one for the jury. (*Mayberry, supra*, 15

Moreover, even assuming arguendo that the trial court should have instructed the jury that all of Maxwell's testimony was subject to the corroboration requirement, the record reveals Maxwell's testimony was adequately corroborated in all respects. Her descriptions of defendant and Cebreros were accurate and very similar to Boender's descriptions. Her claim that she, defendant, and Donna Thompson met Cebreros outside a Jefferson Street house checked out: police arrested Cebreros outside that same house. Finally, her story describing the planned robbery was corroborated by defendant's fingerprint on the roll of duct tape the group planned to use to bind Boender after subduing him. Thus, even if the court erred, it is not reasonably probable that the jury would have reached a different result in the absence of the error. (*Mayberry, supra*, 15 Cal.3d at p. 159 [applying the *Watson* (*supra*, 46 Cal.2d 818) standard of prejudice].)

5. *Miranda Waiver*

Prior to his first trial, defendant moved to suppress his statements to police, claiming his *Miranda*[16] waiver was invalid because Officer Herman failed to inform him of the nature of the charges against him. At the hearing on the motion, Officer Herman testified that on January 29, 1981, he and Officer Vincent located defendant and escorted him to the police station. After entering an interview room, Herman testified he informed defendant that he wished to speak to him about a homicide and read him his *Miranda* rights. Defendant waived his rights and recounted his whereabouts during the previous seven days.

Defendant testified in support of his motion to suppress and stated that he answered Herman's questions in the interview

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Cal.3d at p. 159.)

16. *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

room for approximately an hour before Herman read him his *Miranda* rights and informed him that he was being investigated for a homicide. The trial court thereafter denied the suppression motion, and defendant's statements were introduced at trial. In closing argument, the prosecutor noted that defendant's statements to Officer Herman were inconsistent with his defense at trial that he spent the night of the murder at Salvador Cebreros's home playing chess and drinking beer.

(23) (See fn. 17.)[17] Defendant renews his contention that Officer Herman's failure to inform him of the charges against him precludes a finding that he knowingly and intelligently waived his *Miranda* rights.17 **(24)** Although we are aware that a colorable argument may be made that a *Miranda* waiver is not knowing or intelligent where the suspect is ignorant of the charges against him (see *People* v. *Boyde* (1988) 46 Cal.3d 212, 240 [250 Cal.Rptr. 83, 758 P.2d 25] [acknowledging the argument]; but see *People* v. *Neely* (1979) 95 Cal.App.3d 1011, 1017 [157 Cal.Rptr. 531] [rejecting the claim]), this very contention was recently considered and rejected by the United States Supreme Court.

In *Colorado* v. *Spring* (1987) 479 U.S. 564 [93 L.Ed.2d 954, 107 S.Ct. 851], the defendant was arrested on a firearms charge,

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17. "*Miranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waive." (*Moran* v. *Burbine* (1986) 475 U.S. 412, 421 [89 L.Ed.2d 410, 421, 106 S.Ct. 1135], quoting *Fare* v. *Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2d 197, 212-213, 99 S.Ct. 2560].) Defendant makes no claim that his statements to Officer Herman were involuntary.

waived his *Miranda* rights, and agreed to speak to police. He was then questioned about a prior murder. He claimed at trial that the failure to advise him that he was suspected of the murder invalidated his *Miranda* waiver and required suppression of the statements he made to police about the murder. Although both the Colorado Court of Appeals and the Colorado Supreme Court agreed with him, the United States Supreme Court reversed, holding that "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. [Citations.] The Fifth Amendment's guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect." (*Id.* at p. 574 [93 L.Ed.2d at p. 966].)

Thus, "a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might ... affec[t] his decision to confess.' [Citation.] '[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.'" (*Colorado* v. *Spring, supra*, 479 U.S. at p. 576 [93 L.Ed.2d at 967], quoting *Moran* v. *Burbine, supra*, 475 U.S. at p. 422 [89 L.Ed.2d at p. 421].) Finding no evidence that the defendant "misunderstood the consequences of speaking freely to law enforcement officials" (*Spring, supra*, at p. 575 [93 L.Ed.2d at p. 966]), the high court concluded that "the trial court was indisputably correct in finding that *Spring*'s waiver was made knowingly and intelligently within the meaning of *Miranda*." (*Ibid.*)

Defendant's claim that his Miranda waiver was invalid thus fails even if we accept his version of the facts. As in *Colorado* v. *Spring, supra*, 479 U.S. 564, we conclude defendant was adequately informed of his Fifth Amendment rights and executed a valid waiver of them before speaking to Officer Herman.[18]

Finally, we decline defendant's invitation to exclude his extrajudicial statements by relying on our state Constitution. (See Cal. Const., art. I, § 15 ["Persons may not ... be compelled in a criminal cause to be a witness against themselves"].) Although we are not precluded by article I, section 28, subdivision (d) of the state Constitution from establishing a new exclusionary rule in this case (see *People* v. *Smith* (1983) 34 Cal.3d 251 [193 Cal.Rptr. 692, 667 P.2d 149] [art. I, § 28,subd. (d) only applies to crimes committed after its passage]), we are persuaded by the reasoning of the high court in *Colorado* v. *Spring, supra*, 479 U.S. 564, and conclude defendant's statements were properly admitted.

6. *Admission of Photographs*

Defendant objected at trial to the admission into evidence of two photographs of Allen. The first photograph depicts the victim lying on the bedroom floor as she was found by police. The second photograph was taken during the autopsy and depicts the extent of the victim's head wound. Responding to the objection, the prosecutor asserted the photographs were "admissible not only on the issue of heinous, atrocious and cruel murder but the circumstances of the killing where it took place in the apartment, the manner in which it was done has some relevance to this case, some substantial relevance to this case I think, and I would offer it on that basis also." The trial court overruled the objection, stating, "I don't think this photograph

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18. Although defendant would distinguish *Spring* because the police questioning in that case itself "suggested the topic of inquiry" (*id.* at p. 568 [93 L.Ed.2d at p. 962]), it is clear that only the *trial court* in *Spring* found this point important. (*Ibid.*) As noted above, the high court instead reasoned that an accused can execute a valid *Miranda* waiver even if he is not previously informed of all possible consequences of that decision. (*Id.* at p. 574 [93 L.Ed.2d at p. 966].) We thus reject defendant attempt to distinguish *Spring* on its facts.

is outrageous and inflammatory and I think it is relevant and probative."

(25) "The admission of photographs of a victim lies within the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect." (*People* v. *Carrera* (1989) 49 Cal.3d 291, 329 [261 Cal.Rptr. 348, 777 P.2d 121]; see *People* v. *Phillips* (1985) 41 Cal.3d 29, 54 [222 Cal.Rptr. 127, 711 P.2d 423].)

(26) Defendant first argues reversal is required because admission of the photographs was premised "primarily" on their relevance to the now discredited "heinous, atrocious and cruel" special circumstance set forth in section 190.2, subdivision (a)(14). (*People* v. *Superior Court (Engert)* (1982) 31 Cal.3d 797 [183 Cal.Rptr. 800, 647 P.2d 76]; see also *Maynard* v. *Cartwright* (1988) 486 U.S. 356 [100 L.Ed.2d 372, 108 S.Ct. 1853] [holding a similarly worded aggravating circumstance under Oklahoma law unconstitutionally vague under the Eighth Amendment].) The prosecutor, however, offered the evidence on two distinct theories, namely, that the photographs were relevant to both the special circumstance allegation and to the circumstances of the crime. Although we have since found the "heinous, atrocious and cruel" special circumstance constitutionally infirm (*Engert, supra*), the challenged evidence was clearly admissible on the remaining theory. The first photograph was relevant in indicating "the manner in which the crime had been committed." (*People* v. *Thompson* (1988) 45 Cal.3d 86, 115 [246 Cal.Rptr. 245, 753 P.2d 37]; see also *People* v. *Allen* (1986) 42 Cal.3d 1222, 1256 [232 Cal.Rptr. 849, 729 P.2d 115] [photographs corroborated testimony of a witness as to "location and manner in which the victims were shot"].) The second photograph, taken at the autopsy, corroborated the testimony of the medical experts regarding the nature of the fatal blow. (See *Carrera, supra,* 49 Cal.3d at p. 329; *Thompson, supra*, at p. 115.)

We agree, however, that in ruling on defendant's Evidence

Code section 352 objection, the trial court's consideration of the relevance of the photographs to the now invalidated heinous, atrocious and cruel special-circumstance allegation may have prevented an accurate assessment of the probative value of the evidence balanced against the potential prejudice. Even assuming error, however, reversal is not required. That the evidence of guilt was strong is underscored by the dual identifications of both defendant and Cebreros by Boender and Maxwell, corroborated by the physical evidence such as the baggie of marijuana in Cebreros's boot and defendant's fingerprint on the roll of duct tape. In addition, Maxwell's tale of the botched robbery attempt at her mobilehome, corroborated by Boender, provided the motive for the subsequent murder. Finally, we note the trial court found the photographs neither "outrageous" nor "inflammatory." As in *People* v. *Poggi* (1988) 45 Cal.3d 306, 323 [246 Cal.Rptr. 886, 753 P.2d 1082], "we cannot conclude that it is reasonably probable a result more favorable to defendant would have occurred in the absence of the error."

Finally, although defendant contends the trial court failed to exercise any discretion, his claim is belied by the trial judge's explicit ruling quoted above.

C. *Special Circumstance Issues*

The jury found true four special circumstance allegations against defendant: that the murder was committed while he was engaged in a robbery (§ 190.2, subd. (a)(17)(i)) and a burglary (*id.*, subd. (a)(17)(vii)), that Allen was killed to prevent her testimony (*id.*, subd. (a)(10)), and that the murder was heinous, atrocious, and cruel (*id.*, subd. (a)(14)). As we explain, two of these special circumstance findings must be set aside.

1. *The Felony-murder Special Circumstances*

(27) It is now settled that the jury may sustain a

felony-murder special-circumstance allegation against the actual killer without finding he acted with the intent to kill. (*People* v. *Anderson* (1987) 43 Cal.3d 1104, 1145-1147 [240 Cal.Rptr. 585, 742 P.2d 1306].) **(28)** In order to sustain a felony-murder special-circumstance allegation against an aider and abettor, however, the jury must still find he acted with the intent to kill. (*Ibid.*) **(29)** Defendant contends the two felony-based special-circumstance findings must be reversed because the jury was not instructed to determine whether he intended to kill Allen. He argues that the facts of this case do not show whether he or Cebreros was the actual killer. Thus, the jury may have sustained the robbery-murder and the burglary-murder special-circumstance allegations based on his possible role as an aider and abettor. If so, he argues, the failure to instruct on intent to kill requires reversal.

We disagree. Defendant's jury was given two instructions explaining the theory of aiding and abetting. First, in connection with the general principles of the case, the jury was instructed that "A person aids and abets the commission of a crime if with knowledge of the unlawful purpose of the perpetrator of the crime he *intentionally* aids, promotes, encourages, or instigates by act or advice the commission of such crime." (Italics added.) Later, in being instructed on the special circumstances, the jury was told: "If either defendant ... was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer *in the commission of the murder in the first degree* before you are permitted to find the alleged special circumstance of that first degree murder to be true as to that defendant." (Italics added.)

This latter instruction is indistinguishable from one this court approved in *People* v. *Warren* (1988) 45 Cal.3d 471 [247 Cal.Rptr. 172, 754 P.2d 218]. In that case, the defendant claimed that the instructions did not adequately require the jury to find he, an aider and abettor, acted with the intent to kill.

After stating the rule that intent to kill must be shown before a felony-based special-circumstance allegation can be sustained against an aider and abettor, we concluded that "a reasonable juror would understand the language of the instructions to declare that very rule: 'the defendant was ... a person who intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of murder in the first degree.' Therefore, the instructions, so understood, state the law correctly." (*Id.* at p. 487.)Because essentially the same instruction was given in the present case, we conclude that defendant's jury necessarily found defendant, if he was an aider and not the actual killer, acted with the intent to kill.

Defendant focuses on the felony-murder instructions to argue for a contrary conclusion. He notes the jury was also told that, for purposes of the felony-murder rule, the killing can be unintentional or even accidental so long as it occurs while the killer is engaged in an enumerated felony. Thus, defendant claims the jury may only have found he intentionally aided in the burglary and robbery with Allen's killing being merely accidental. If so, no intent to kill would be present.

We rejected this precise argument in *Warren, supra*, 45 Cal.3d at pages 487-488, finding no reasonable juror would interpret the jury instructions in such a "hypertechnical manner." Moreover, two other reasons support rejection of this contention. First, the special circumstance instruction on aiding and abetting mirrors the language in section 190.2, subdivision (b), and thus unambiguously sets forth the rule that "the aider and abetter must intentionally aid *in a killing*." (*Anderson, supra*, 43 Cal.3d at p. 1145, italics in original.) Thus, the instructions cannot reasonably be interpreted to require only aiding in a felony which forms the basis of a felony murder. Second, as explained post, the jury's verdict on the witness-killing special circumstance precludes a finding that the killing was unintentional. Thus, defendant could not have been convicted of intentionally aiding an accidental killing.

(30) Although not raised by defendant, the burglary-murder special circumstance must be set aside for the same merger problems discussed *ante*, at page 509, i.e., the jury instructions improperly permitted the jury to find a burglary based on defendant's intent to commit an assault. (*Wilson, supra*, 1 Cal.3d at p. 441; see generally *People* v. *Garrison* (1989) 47 Cal.3d 746, 788-789 [254 Cal.Rptr. 257, 765 P.2d 419] [striking two burglary-murder special circumstances for the same reasons despite the issue not being raised by defendant].)

2. *The Witness-killing Special Circumstance*

The jury sustained the special circumstance allegation set forth in section 190.2, subdivision (a)(10), i.e., that "[t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing [her] ... testimony in any criminal proceeding, and the killing was not committed during the commission ... of the crime to which [s]he was a witness." Defendant first contends we must reverse this finding because the jury was not instructed to find he acted intentionally, reiterating his argument that he may have merely aided Cebreros, the actual killer. As explained above, however, the instructions adequately required the jury to find the necessary intent for an aider and abettor.

(31) Second, defendant claims that before a jury may sustain a witness-killing special-circumstance allegation, there must be a pending criminal proceeding at the time of the killing. We rejected this argument in *People* v. *Weidert* (1985) 39 Cal.3d 836 [218 Cal.Rptr. 57, 705 P.2d 380], explaining that "if an accused believes himself to be exposed to criminal prosecution and intentionally kills another to prevent that person from testifying in an anticipated or pending criminal proceeding, the special circumstance may be found true whether or not an actual criminal proceeding was pending or about to be initiated." (*Id.* at pp. 853-854.)

(32) Defendant next claims the trial court confused the jury

by delivering an instruction defining the crime of dissuading a witness (§ 136.1) immediately before instructing the jury on the witness-killing special circumstance.[19] Inasmuch as he was not charged with violating section 136.1, he claims that the instruction "may" have created "serious confusion" on the part of the jury. We disagree.

Before the challenged instruction was given, the jury was instructed on burglary, a charged offense. In addition to robbery, assault, and false imprisonment, dissuading a witness was listed as a possible felony that defendant intended to commit when he entered Boender's apartment. Thus, the challenged instruction explained a "general principle[] of law relevant to the issues raised by the evidence" and was "necessary for the jury's understanding of the case." (*People* v. *Wickersham* (1982) 32 Cal.3d 307, 323 [185 Cal.Rptr. 436, 650 P.2d 311], quoting *People* v. *Sedeno* (1974) 10 Cal.3d 703, 715-716 [112 Cal.Rptr. 1, 518 P.2d 913], internal quotation marks omitted.)

Defendant also asserts the potential for confusion was great because the crime of dissuading a witness carries different elements from the witness-killing special circumstance. Any potential confusion, however, was dispelled by the explicit instruction on the special circumstance. Thus, the instruction required, "One, that the person killed was a witness to a crime; two, that the witness was intentionally killed for the purpose of preventing his or her testimony in a criminal proceeding; and three, that the killing was not committed during the commission ... of the crime to which the person killed was a witness." Expressed in such a straightforward manner, we find the

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19. The instruction read, "Every person who knowingly and maliciously prevents or dissuades or attempts to prevent or dissuade a witness or victim from making a report of such victimization to any peace officer is guilty of a felony if such acts, one, are accompanied by force or by an express or implied threat of force to violence upon the witness or victim; or, two, where such acts are in furtherance of a conspiracy." This instruction is based on section 136.1, subdivision (c)(1), (2).

possibility that the jury sustained the special circumstance without finding these explicit elements is quite remote.[20]

Defendant further argues that the potential for misleading the jury was heightened by the trial court's delivery of the instruction concerning dissuading a witness immediately before instructing on the witness-killing special circumstance. **(33)** However, "[t]he general rule is that the order in which instructions are given is immaterial" (*People* v. *Carrasco* (1981) 118 Cal.App.3d 936, 942 [173 Cal.Rptr. 688]; see also 21 Cal.Jur.3d (Rev.), Criminal Law, § 3052, p. 704), and the jury here was specifically instructed that "[t]he order in which these instructions are given has no significance as to their relative importance." We thus conclude the proximity of the challenged instruction to the instruction explaining the witness-killing special circumstance did not work to defendant's prejudice.

(34) Defendant next claims that section 190.2, subdivision (a)(10) should be read to require the jury to find that "but for" the intent to prevent Allen from testifying, she would not have been killed. Stated another way, he urges us to find that the statutory phrase"for the purpose of preventing his testimony"

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20. The jury was also given instructions defining a conspiracy, although defendant was not charged with that crime. This may have been to lay a foundation for a later instruction informing the jury how to evaluate a coconspirator's (i.e., Brenda Maxwell's) statements, or to present a vicarious liability theory based on defendant's and Cebreros's status as coconspirators. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 750 [248 Cal.Rptr. 126, 755 P.2d 310] [court can instruct on conspiracy even if not charged]; *People* v. *Washington* (1969) 71 Cal.2d 1170, 1174 [81 Cal.Rptr. 5, 459 P.2d 259, 39 A.L.R.3d 541] [same].) Defendant contends that the mention of a conspiracy may have led the jury to believe it could sustain the special circumstance allegation against him even if he only intended that Allen be intimidated but not killed. We need not resolve this problem, however, because as discussed *ante*, the instructions and the jury's verdicts show that it found defendant harbored the intent to kill. (Of course, there was sufficient evidence for the jury to find defendant himself struck the fatal blows and was thus the actual killer, not a mere aider and abettor.)

should be interpreted to mean "for the sole purpose of ...." He claims this interpretation is necessary to ensure that the special circumstance is not improperly enlarged to encompass one who kills when the elimination of a witness is merely incidental to the crime. (Cf. *Green, supra*, 27 Cal.3d 1 [commission of felony incidental to a killing cannot support felony-murder special circumstance].)

We reject defendant's attempted analogy to *Green, supra*. First, nothing in the legislative scheme indicates an intent to limit the scope of the witness-killing special circumstance as defendant suggests. The facts of this case are illustrative. Defendant's intent in killing Allen (and in attempting to kill Boender) was clearly twofold: he intended to rob them and to eliminate witnesses from the robbery attempt at Maxwell's trailer. To hold that the witness-killing special circumstance does not apply because defendant had a second reason to kill would unjustifiably reward him for having a criminal ambition greater than one who kills motivated solely by the desire to eliminate a witness.

Second, we cannot conceive of a situation in which the motive to kill a witness is merely "incidental" to the crime. Unlike the "technical" robbery committed by the defendant in *Green, supra*, 27 Cal.3d 1, when he took his victim's jewelry in order to conceal his identity as the murderer, the motive to kill a witness to a previous crime can never be incidental. We hold the plain meaning of the special circumstance is sufficiently limited: the trier of fact must find that the victim was killed "for the purpose of preventing his testimony."

(35) To the extent defendant is claiming there is insufficient evidence to support the witness-killing special circumstance, he is mistaken. Shortly after the botched attempt to rob Boender at Maxwell's mobilehome, defendant expressed concern that Boender could identify him. Defendant then sought out Cebreros, who "owed him a favor." A few days later, defendant and Cebreros appeared at Boender's apartment, bound and blindfolded Boender and Allen, moved them to separate rooms,

and struck both savagely on the back of the head. Allen died but Boender survived. From this evidence, the jury could infer that defendant intended to kill the two due to their ability to identify him as their assailant at Maxwell's home a few days earlier.

3. *The Heinous, Atrocious and Cruel Special Circumstance*

(36) Defendant also contends the jury's finding that the murder was heinous, atrocious and cruel (see § 190.2, subd. (a)(14)) must be set aside because the terms of that special circumstance are unconstitutionally vague. We agree. (*People* v. *Superior Court (Engert), supra*, 31 Cal.3d 797.)

D. *Penalty Phase Issues*

1. *Prejudicial Effect of Excessive Special Circumstances*

(37) Defendant claims the death penalty must be reversed because all four special circumstance findings are invalid. As explained *ante*, only two special circumstance findings — the so-called heinous, atrocious and cruel special circumstance and the burglary-murder special circumstance — must be set aside. Although we assume defendant would argue that the jury's consideration of even one invalid special circumstance requires reversal of the penalty judgment, we disagree. The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors (*Zant* v. *Stephens* (1983) 462 U.S. 862 [77 L.Ed.2d 235, 103 S.Ct. 2733]), and this court is in accord. (See *People* v. *Silva* (1988) 45 Cal.3d 604, 632-636 [247 Cal.Rptr. 573, 754 P.2d 1070] [affirming despite the jury's consideration of invalid special-circumstance findings]; *Allen, supra*, 42 Cal.3d at pp. 1281-1283 [same].)

In this case, the jury properly considered two special circumstances (robbery-murder and witness-killing) and two

improper special circumstances (heinous-murder and burglary-murder). Although the prosecutor mentioned the heinous-murder special circumstance in closing argument, he did not heavily rely on it, instead choosing to stress the circumstances of the crime itself. (See *Allen, supra*, 42 Cal.3d at pp. 1279-1280.) After merely listing the four special circumstances the jury had sustained, the prosecutor addressed the applicable aggravating factors, noting Allen's killing was "a cold, calculated, callous act. You have already concluded and correctly so that it fell within the special circumstance known as especially heinous, atrocious and cruel murder, that it exhibited exceptional depravity ...."

Despite the latter statement, the prosecutor did not urge the jury to impose the death penalty merely because the crime could be categorized as heinous or atrocious, or because of the sheer number of special circumstances. (See *People* v. *Silva, supra*, 45 Cal.3d 604, 635.) Instead, he described and emphasized the circumstances of the crime, saying it was a "pitiless act committed against a young, defenseless woman in the prime of her life." Later, he argued that the jury could "also consider not only. the brutal murder of Janice Allen, but the vicious attack on Dale Boender two days before and [the] equally vicious attack on him the night of the murder of Janice Allen. *Those are circumstances and factors which you certainly should consider in this case.*" (Italics added.) As in *Silva, supra*, "we conclude a reasonable juror would not have been swayed by abstract concepts of 'heinous[, atrocious or cruel]' ... but would instead have focused on the actual circumstances of the offense which formed the foundation for finding those special circumstances to be true." (*Id.* at p. 635.)

Consideration of the invalid burglary-murder special circumstance was similarly benign. Again, the prosecutor did not focus on the bare number of special circumstance findings but urged the jury to consider the brutality of the crimes. Because virtually the same facts underlay both the burglary and robbery, and because the jury properly considered the

circumstances of the robbery-murder, there was little chance defendant was prejudiced by consideration of the burglary-murder special circumstance.

2. *Alleged Brown Error*

(38) Defendant maintains reversal of the penalty judgment is required because the jury was instructed that if it concluded "the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." (Italics added.) He claims this instruction impermissibly restricted the jury's sentencing discretion and directed a verdict of death.

In *People* v. *Brown, supra*, 40 Cal.3d 512, reversed on another issue sub nomine *California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837], we concluded use of the word "outweigh" in the statute "connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all the various factors he is permitted to consider, including [section 190.3,] factor 'k' as we have interpreted it [in *People* v. *Easley* (1983) 34 Cal.3d 858 (196 Cal.Rptr. 309, 671 P.2d 813)]. By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People* v. *Brown, supra*, at p. 541 [fn. omitted]; see also *People* v. *Hamilton* (1989) 48 Cal.3d 1142, 1181 [259 Cal.Rptr. 701, 774 P.2d 730]; *Allen, supra,* 42 Cal.3d at pp. 1276-1280.)

Whether the unadorned "shall" instruction requires reversal depends on the facts of each individual case. Every case "must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice

about the scope of its sentencing discretion under the 1978 law." (*People* v. *Brown, supra*, 40 Cal.3d at p. 544, fn. 17; *Allen, supra*, 42 Cal.3d at p. 1277.) Our inquiry on appeal requires us to consider whether the jury instructions, read in conjunction with the prosecutor's arguments, adequately informed the jury of "its weighing and decision-making responsibility." (*People* v. *Williams* (1988) 44 Cal.3d 1127, 1148 [245 Cal.Rptr. 635, 751 P.2d 901]; see also *Guzman, supra*, 45 Cal.3d at pp. 958-959.)

The jury was instructed with former CALJIC No. 8.84.1, which detailed the various aggravating and mitigating factors in the language of the statute and instructed the jury to "consider, take into account and be guided by" the factors. Former CALJIC No. 8.84.2 was also given. That instruction informed the jury it "shall" impose the death penalty if it found the aggravating circumstances "outweigh[ed]" the mitigating ones. No other instructions explaining the jury's role, such as an "expanded factor(k)" instruction (see *Guzman, supra*, 45 Cal.3d at pp. 956-958; *Easley, supra*, 34 Cal.3d at p. 878, fn. 10), were given.

Our first concern is whether the jury was led to believe it should merely count the various factors instead of evaluating the moral weight of each factor. (*Guzman, supra*, 45 Cal.3d at p. 959.) We find nothing in the record supporting this possibility. Nowhere did the prosecutor urge the jury to merely count the number of aggravating and mitigating factors and mechanically or arithmetically impose the death penalty. Although at one point the prosecutor stated, "There is nothing to weigh because everything falls on one side of the weighing process," this was a permissible observation of the state of the penalty phase evidence inasmuch as defendant declined to present any mitigating evidence. The clear import of this argument was that because of the great weight of the aggravating evidence compared to the dearth of mitigating evidence, death was the appropriate penalty. It is clear the prosecutor was not urging the jury to merely count the factors.

We thus turn to the question of "whether the jury understood that it was responsible for deciding for itself whether death is appropriate for the defendant." (*Guzman, supra*, 45 Cal.3d at p. 959, italics omitted.) The prosecutor began by stating that "It is the law of the State of California that in certain cases the penalty for first degree murder with special circumstances shall be the death penalty. [¶] This, ladies and gentlemen, is one of those cases." We find nothing improper in this statement. It merely restates the law that, for certain defendants convicted of murder, death is the appropriate penalty. This is true: for those defendants as to which a jury decides the aggravating circumstances outweigh the mitigating circumstances, the Penal Code provides that the appropriate penalty is death.

The prosecutor also explained the meaning of the word "shall" in the instructions, saying, "I emphasize the word 'shall' there because every single aggravating circumstance that the court will read to you is present in this case and there are no mitigating circumstances." He also stated that should the jury find the aggravating circumstances outweigh the mitigating ones, "then it is your duty as jurors to return the death penalty in this case."

This explanation, however, was qualified by language informing the jury to take the statutory factors into "consideration." The prosecutor also told the jury to "take into account those factors and be guided" by them. The prosecutor's argument thus fell short of divesting the jury of discretion or leading them to believe that it had no choice but to impose the ultimate penalty. Although he briefly emphasized the word "shall," that alone is not determinative. (See *Allen, supra*, 42 Cal.3d at p. 1279 & fn. 38.)

Defendant relies on two recent cases in which this court reversed penalty judgments for Brown error (*People* v. *Edelbacher* (1989) 47 Cal.3d 983 [254 Cal.Rptr. 586, 766 P.2d 1]; *People* v. *Crandell* (1988) 46 Cal.3d 833 [251 Cal.Rptr. 227, 760 P.2d 423]), but neither is persuasive. We reiterate that we must examine the entire record in each case to determine

whether "the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." (*People* v. *Brown, supra*, 40 Cal.3d at p. 544, fn. 17; *Allen, supra*, 42 Cal.3d at p. 1277.) While both cases cited by defendant have some similarity to the present case, there are significant differences. For example, the prosecutor in *Crandell* "portrayed the weighing process as being essentially an inquiry into whether the capital offenses were in any way justified or excused rather than a process for determining ... which of the two penalties was more appropriate." (*Crandell, supra*, at p. 884.) A similar interpretation was offered by the prosecutor in *Edelbacher, supra*, at page 1038.

By contrast, the prosecutor in defendant's case carefully went through each statutory factor, concluding that several were present and that no mitigating factors were apparent. In concluding death was the "proper" penalty, the prosecutor did not argue that the jury was divested of its discretion but that after weighing the statutory factors, the "proper" penalty was death. As in *Guzman, supra*, 45 Cal.3d 915, "we cannot agree that [the prosecutor's] statements, read as a whole, misinformed the jury about its weighing and sentencing discretion." (*Id.* at p. 960.)[21]

3. *Failure to Present Mitigating Evidence*

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21. As Justice Mosk recognizes in his dissenting opinion, *post*, the United States Supreme Court recently filed two opinions that may affect our analysis of so-called *Brown* error. (*Boyde* v. *California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190]; *Blystone* v. *Pennsylvania* (1990) 494 U.S. 299 [108 L.Ed.2d 255, 110 S.Ct. 1079].) Both cases suggest that the premise of much of this court's reasoning in *Brown*--that capital juries should not be told their choice of sentence is mandatory if certain factual findings are made--may have been overstated. Because we find no error under *People* v. *Brown, supra*, 40 al.3d 512, and its progeny, however, we have no occasion to determine the impact of *Boyde* and *Blystone* on this case.

Following the jury's verdict of first degree murder with four special circumstances, defense counsel Hoover explained to the trial court that defendant wished that no mitigating evidence be presented on his behalf at the penalty phase of the trial. Mr. Hoover stated that "I believe [defendant's] position is that life without parole is unacceptable to him. He cannot accept that as an alternative whatsoever; and for that reason does not want me to ask the jury for that alternative. He does not consider it to be viable. He cannot reconcile it in his own mind. [¶] As I explained to the court, this again causes me a dilemma. This attitude is not new. It's something that hasn't just come up between us. [¶] I find that it differs substantially from my advice." After observing that he was unsure whether he had the power to present mitigating evidence over the express wishes of his client, Mr. Hoover requested the court appoint a medical expert to examine his client.

The trial court, concerned that defendant may have been relying on an erroneous belief that his chances for a reversal on appeal would be enhanced if he declined to participate in the penalty phase, asked defendant if that was the basis for his decision. Defendant replied in the negative, explaining that he had "approximately 20 reasons that I believe are my basic fundamental thought processes that I have believed in for most of my adult life and the feelings that I do have about life without parole is [that it is] unacceptable." The court then appointed Robert Cook, an experienced criminal defense attorney, to counsel defendant about his decision, as well as Dr. Matychowiak — apparently a psychiatrist — to examine him.

The parties returned to court a week later. Defendant had consulted with both Cook and Matychowiak[22/] but had not changed his mind about participating in the penalty phase of the trial. After noting that members of defendant's family were

22. The trial court observed that it did not perceive defendant to be suffering from any mental aberration. Defense counsel concurred in this assessment.

present in court, the court questioned defendant further and discovered that he had instructed Mr. Hoover to refrain from cross-examining the prosecution's penalty phase witnesses. In addition, defendant stated he would not be himself addressing the jury.

When defendant was asked whether he desired the death penalty, Mr. Hoover explained: "[defendant] has indicated that he doesn't want me to do anything which would have the ultimate [effect] of receiving a sentence of life without the possibility of parole, a sentence which he finds to be as objectionable to him as the sentence of death and because of that reason, because of his feeling in this regard he would just as soon not present any evidence at this time." Mr. Hoover conceded that he did not believe defendant's position was irrational and that he believed defendant was sincere in his belief. Later, he underscored defendant's position: "I want to make the record clear that he is not requesting one sentence or the other. He finds both sentences objectionable ...."

The trial court tried one last time to persuade defendant to change his mind, asking, "Mr. Sanders, does it continue to be your position that you do not wish your counsel to ask any questions nor present any evidence in this penalty phase of the trial?" Defendant responded: "That is correct, your Honor." The prosecutor thereafter presented his penalty phase evidence. After the prosecutor gave his closing argument to the jury, Mr. Hoover waived argument and the case was submitted to the jury.

(39a) We have identified two potential theories which may cast doubt on a penalty verdict when a capital defendant decides to forgo presentation of mitigating evidence at the penalty phase. First, the absence of mitigating evidence may undermine "the state's interest in a reliable penalty determination." (*People* v. *Deere* (1985) 41 Cal.3d 353, 364 [222 Cal.Rptr. 13, 710 P.2d 925].) Second, a defense counsel's performance may be deemed constitutionally inadequate if he or she simply accedes to his client's wishes instead of "making an independent tactical

judgment about the presentation of the mitigating evidence." (*Williams, supra*, 44 Cal.3d at p. 1151; *Deere, supra*, at pp. 364-368.) Defendant relies on both theories in urging that we reverse the penalty judgment.

As to the state's independent interest in achieving a reliable penalty verdict, however, we recently concluded that a defendant's failure to present mitigating evidence generally does not render the verdict unreliable in the constitutional sense. "[T]he required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures,[23/] and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements." (*People* v. *Bloom, supra*, 48 Cal.3d 1194, 1228; see also *People* v. *Lang* (1989) 49 Cal.3d 991, 1030 [264 Cal.Rptr. 386, 782 P.2d 627] [quoting *Bloom* with approval].)

(40) We have also disapproved of the suggestion in *Deere, supra*, 41 Cal.3d 353, that counsel necessarily provides constitutionally inadequate representation when he or she accedes to a client's wishes and declines to present available mitigating evidence at the penalty phase of a capital trial. (*Lang, supra*, 49 Cal.3d at pp. 1030-1031.) At least in the absence of

23. We left open the possibility that the state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present available mitigating evidence, the jury was also given misleading instructions and heard misleading argument. (*People* v. *Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9 [259 Cal.Rptr. 669, 774 P.2d 698]; *Williams, supra*, 44 Cal.3d at p. 1152.) As we concluded, *ante*, at pages 521-524, the prosecutor's closing argument in this case was not objectionable and the jury instructions, although potentially misleading, did not actually deceive the jury into believing it lacked discretion regarding the choice of penalty.

evidence showing counsel failed to investigate available mitigating evidence or advise defendant of its significance (*id.* at pp. 1032-1033),[24/] we cannot say defendant's trial attorney provided ineffective assistance of counsel.

Defendant notes that in contrast to other cases involving this issue (see e.g., *Williams, supra*, 44 Cal.3d at p. 1152; *Guzman, supra*, 45 Cal.3d at p. 961), he presented absolutely no mitigating evidence in this case. In addition, there was no defense closing argument and counsel did not even cross-examine the prosecution witnesses. (Defense counsel did register several objections during the questioning of the prosecutor's witnesses, however.) Thus, he argues, the jury was left with nothing to "weigh" against the People's penalty phase evidence, thereby effectively foreclosing a verdict of life without the possibility of parole.

In light of our recent decisions disapproving the reasoning of *Deere, supra*, 41 Cal.3d 353, we conclude these circumstances do not support a reversal of the penalty judgment. Defendant's knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase of his trial estops him from now claiming an entitlement to a reversal based on those decisions. (*Lang, supra*, 49 Cal.3d at pp. 1031-1032.)

(39b) Finally, defendant claims his decision to forgo presentation of evidence at the penalty phase of his trial was tantamount to a guilty plea without the consent of his counsel in violation of section 1018. That section states in pertinent part: "No plea of guilty of a felony for which the maximum

24. Defendant contends his decision to decline to present any mitigating evidence was not a fully informed decision because he was not told that the trial court possessed the power to strike the special circumstances and thus make him eligible for parole. (*People* v. *Williams* (1981) 30 Cal.3d 470, 489 [179 Cal.Rptr. 443, 637 P.2d 1029].) This assertion is belied by the record, which shows that a defense motion to set aside the special circumstance findings was denied by the trial court prior to presentation of evidence at the penalty phase.

punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel."

We reject defendant's argument because we find the premise faulty: his decision to refrain from offering evidence is not tantamount to a guilty plea and is thus not governed by section 1018. His choice did not amount to an admission that he believed death was the appropriate penalty, nor did he give up his right to confront or cross-examine those testifying against him at the penalty phase. (Cf. *Boykin* v. *Alabama* (1969) 395 U.S. 238, 243 [23 L.Ed.2d 274, 279, 89 S.Ct. 1709]; *In re Tahl* (1969) 1 Cal.3d 122, 130-133 [81 Cal.Rptr. 577, 460 P.2d 449].) Moreover, his decision refusing to take part in the penalty phase did not necessarily make it any more likely that his jury would find death was the appropriate penalty. The jury could, for example, have found mitigating factors from evidence presented at the guilt phase.[25] We conclude the scope of section 1018 is not so broad as to embrace defendant's decision of nonparticipation in the penalty phase of his trial.

4. *Other issues*

a. *"No Sympathy" Instruction*

Prior to the guilt phase jury deliberations, the trial court instructed the jury not to be "swayed by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (See CALJIC No. 1.00.) Following the penalty phase, the jury was instructed: "You are reminded that you are to be guided by the previous instructions given in the first phase of the case which are applicable to this particular phase of the case."

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25. Capital juries are routinely instructed at the penalty phase that "you shall consider all of the evidence which has been received during any part of the trial of this case." (CALJIC No. 8.85.)

Defendant contends this latter instruction injected the "no sympathy" instruction into the penalty phase deliberations and improperly precluded the jury's consideration of any sympathetic factors shown by the evidence. We have rejected this argument in previous cases (*People* v. *Allison* (1989) 48 Cal.3d 879, 899, fn. 11 [258 Cal.Rptr. 208, 771 P.2d 1294]; *People* v. *Gates* (1987) 43 Cal.3d 1168, 1209 [240 Cal.Rptr. 666, 743 P.2d 301]), and defendant presents no reason why we should reconsider those decisions.[26]

b. *Dual Use of Underlying Crimes*

(41) Defendant asserts the trial court should have modified the standard penalty phase instruction to make clear that factor (b)[27] pertained to criminal activity other than that for which he was convicted in the present proceeding. By failing to modify the instruction, he claims the jury may have "double counted" the circumstances of his crimes against Boender and Allen when weighing the various factors during the penalty phase deliberations. We have previously rejected this argument (*People* v. *Ainsworth, supra*, 45 Cal.3d 984, 1032; *People* v. *Miranda, supra*, 44 Cal.3d at pp. 105-106) and, in any event, we find no possibility the jury was misled here. The record shows the prosecutor, in closing argument, clearly tied factor (b) to the evidence of the five armed robberies defendant committed in

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26. We also note that the United States Supreme Court has held that giving the antisympathy instruction at the penalty phase itself is not itself unconstitutional per se (*California* v. *Brown, supra,* 479 U.S. 538), although state law prohibits giving CALJIC No. 1.00 at the penalty phase. (*People* v. *Brown, supra*, 40 Cal.3d at p. 537, fn. 7.) Here, of course, the challenged instruction was not given at the penalty phase but at the guilt phase.

27. Section 190.3, factor (b) permits the jury to consider, as an aggravating or mitigating factor, "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

1970.

c. **Excessive Special Circumstances**

(42) Citing the plurality opinion in *People* v. *Harris, supra,* 36 Cal.3d 36, defendant contends the trial court erred by permitting the jury to consider both the robbery-murder and the burglary-murder special circumstances in its penalty deliberations. Harris reasoned that when the robbery and burglary were committed as part of an indivisible transaction, section 654[28/] precludes a finding of multiple special circumstances. (36 Cal.3d at p. 65.)

We have since rejected the *Harris* plurality on this point. (*People* v. *Bean* (1988) 46 Cal.3d 919, 954-955 [251 Cal.Rptr. 467, 760 P.2d 996]; *People* v. *Melton* (1988) 44 Cal.3d 713, 765-769 [244 Cal.Rptr. 867, 750 P.2d 741].) Thus, "any robbery and burglary committed by defendant in the course of his homicidal conduct could properly be considered an independent aggravating factor. Each involved violation of [a] distinct interest that society seeks to protect, and a defendant who commits both offenses in the course of a murder may be deemed more culpable than a defendant who commits only one." (*Bean, supra*, at pp. 954-955.) Thus, the trial court did not err in permitting the jury to consider both special circumstances.

5. *Proportionality Review*

(43) Defendant submits this court must engage in both intracase and intercase proportionality review. Initially, he complains that because the People declined to seek the death

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28. Section 654 provides: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more that one . . . .

penalty against codefendant Cebreros, and because they never proved which of the two men was the actual killer, death is a constitutionally disproportionate penalty in this case. He also urges this court to undertake comparative sentence review, claiming we will find his crime much less serious than others for which only life terms were imposed.

We may quickly reject this latter argument: neither the federal nor the state Constitution compels comparative sentence review and we have in numerous cases declined to undertake such review. (*People* v. *Caro* (1988) 46 Cal.3d 1035, 1068 [251 Cal.Rptr. 757, 761 P.2d 680]; *People* v. *Poggi, supra*, 45 Cal.3d 306, 348; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; see *Pulley* v. *Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871].)

We also reject defendant's claim for relief based on a comparison of his sentence and the sentence imposed on Cebreros. Although the evidence of guilt was largely the same for the two defendants, the determination of penalty requires the jury to engage in a normative function, weighing "non-quantifiable" or intangible aspects of both the crime and the criminal. (*Allen, supra*, 42 Cal.3d at p. 1287.) Thus, "[t]he peculiarly normative and individualized nature of the jury's sentence determination in each case makes it inappropriate and of no benefit to consider the sentence imposed in superficially similar cases for the purpose of determining the prejudicial effect of error." (*People* v. *Malone* (1988) 47 Cal.3d 1, 57, fn. 31 [252 Cal.Rptr. 525, 762 P.2d 1249]; see also *People* v. *Dyer* (1988) 45 Cal.3d 26, 69-71 [246 Cal.Rptr. 209, 753 P.2d 1] [rejecting this precise argument].)

Moreover, we observe that of the two assailants, defendant was the one with the motive to silence Boender and Allen; he — and not Cebreros — was the one armed with a firearm. On the state of the evidence he was as likely as Cebreros to have been the actual killer and the jury found, at least impliedly, that he acted with the intent to kill, and that he had committed five prior armed robberies. Thus, even were we disposed to find

significance in the fact that Cebreros received a life sentence, we cannot conclude that defendant's death sentence is constitutionally suspect.

Finally, to the extent defendant is claiming his sentence is constitutionally disproportionate under article I, section 17 of the California Constitution (*People* v. *Dillon* (1983) 34 Cal.3d 441, 449-484 [194 Cal.Rptr. 390, 668 P.2d 697]; *In re Lynch* (1972) 8 Cal.3d 410, 423-429 [105 Cal.Rptr. 217, 503 P.2d 921]), we conclude that in light of the aforementioned facts of his case, his sentence is not disproportionate to his individual culpability.

III. Conclusion

The heinous, atrocious and cruel special circumstance, as well as the burglary-murder special circumstance, is set aside. The judgment as to both guilt and penalty is otherwise affirmed.

Panelli, J., Eagleson, J., Kennard, J., and Arabian, J., concurred.

MOSK, J.—I dissent.

In my view, the judgment should be reversed in its entirety. I agree with Justice Broussard that defendant's right to trial by a jury drawn from a representative cross-section of the community, which is guaranteed by both the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16, of the California Constitution, was violated in this case by the systematic underrepresentation of Hispanics. (See dis. opn. of Broussard, J., *post*, at pp. 538-543.)

Further, the judgment should be reversed as to penalty on separate and independent grounds. As I shall explain, the verdict of death should be vacated because of Deere error

(*People* v. *Deere* (1985) 41 Cal.3d 353 [222 Cal.Rptr. 13, 710 P.2d 925]) and also because of *Brown* error (*People* v. *Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440], revd. on other grounds sub nom. *California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]).

I

Defense counsel's failure to present available evidence in mitigation at the penalty phase resulted in a verdict of death that does not satisfy the heightened degree of reliability required by the Eighth Amendment to the United States Constitution and article I, section 17, of the California Constitution.

After the guilt phase, defense counsel stated in substance that at defendant's request and against his own best judgment, he would not participate in the penalty phase. He made it plain that he had mitigating evidence available: "[Defendant's] mother, his father, his grandmother and his sister are all here in this courtroom. I can put on the evidence." But he also made it plain that at defendant's request, he would not present such evidence.

At the penalty phase, the prosecution put on a case for death. Other than making a few objections, the defense did nothing at all.

In *People* v. *Deere, supra*, 41 Cal.3d 353, the court reversed a judgment of death on the ground that defense counsel's failure to present evidence in mitigation — although in accord with his client's wishes — rendered the penalty determination constitutionally unreliable. As I stated in my concurring and dissenting opinion in *People* v. *Williams* (1988) 44 Cal.3d 1127, 1158-1159 [245 Cal.Rptr. 635, 751 P.2d 901]:

"First, the [Deere] court determined that counsel's failure to present evidence in mitigation introduced error into the penalty proceeding.

"'To permit a defendant convicted of a potentially capital crime to bar his counsel from introducing mitigating evidence

at the penalty phase ... would ... prevent this court from discharging its constitutional and statutory duty to review a judgment of death upon the complete record of the case, because a significant portion of the evidence of the appropriateness of the penalty would be missing.

"'This deficiency of the record implicates another paramount concern of the state: "in capital cases ... the state has a strong interest in reducing the risk of mistaken judgments." ... Since 1976 the United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 961, 96 S.Ct. 2978] (plur. opn.).) And since 1978 the high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. (*Lockett* v. *Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954] (plur. opn. of Burger, C. J.).)

"'To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.' (41 Cal.3d at pp. 363-364.)

"Next, the [*Deere*] court determined that so long as 'the record ... demonstrates "the possibility that at least *someone* might have been called to testify on defendant's behalf and to urge that his life be spared"' (41 Cal.3d at p. 367, italics in original), the error introduced into the penalty proceeding by counsel's failure to present evidence in mitigation cannot be deemed harmless. The court explained:

"'When the sentencer in a capital case is deprived of all or a substantial part of the available evidence in mitigation, "the potential for prejudice is too obvious to require proof."

[Citation.] Indeed, "short of substituting a verdict of its own, there is no way for a reviewing court to determine what effect unpresented mitigating evidence might have had on the sentencer's decision." [Citation.] We have no doubt that a judgment of death imposed in such circumstances constitutes a miscarriage of justice (Cal. Const., art. VI, § 13): not only did defendant not have a fair penalty trial — in effect he had no penalty trial at all.' (41 Cal.3d at p. 368.)"

I turn now to the case at bar. On the face of the record it is plain that Deere error occurred: at defendant's request, counsel declined to present available evidence in mitigation, and indeed effectively declined to participate in any manner in the penalty phase.

It is also plain that the error here cannot be deemed harmless. As in Deere, "the record ... demonstrates 'the possibility that at least *someone* might have been called to testify on defendant's behalf and to urge that his life be spared.'" (*People* v. *Deere*, *supra*, 41 Cal.3d at p. 367, italics in original.) In this case, such potential witnesses were available, including defendant's father and mother, his grandmother, and his sister.

Accordingly, I would set aside the verdict of death as constitutionally unreliable and would reverse the judgment as to penalty. (See *People* v. *Deere*, *supra*, 41 Cal.3d at p. 368.)[1/]

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1. In finding no prejudicial error, the majority rely on the proposition that "'[T]he . . . reliability [required by the Eight Amendment in death penalty cases] is attained when;" --as assertedly here -- "'the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. . . .'" (Maj. opn. *ante*, at pp. 525-526, quoting *People* v. *Bloom* (1989) 48 Cal.3d 1194, 1228 [259 Cal.Rptr. 669, 774 P.2d 698], maj. opn. fn. omitted.) To my mind, that proposition is unsound. Reliability can be assured only when the record on which the verdict is based is "complete," i.e., when it does not lack any "significant portion of the evidence of the appropriateness of the penalty" that counsel reasonably concludes "'. . .

II

The trial court committed error under *People* v. *Brown, supra*, 40 Cal.3d 512, by instructing the jury in accordance with the mandatory sentencing language of the final paragraph of Penal Code section 190.3 (hereafter section 190.3).

The statutory provision declares: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances ..., and *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (Italics added.)

The instruction stated: "After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances ... [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." (Italics added.)

In *Brown* the court construed the final paragraph of section 190.3 as follows. "In [its] context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider .... By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating,

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makes the most compelling case in mitigation.'" (*People* v. *Deere, supra*, 41 Cal.3d at pp. 363, 364, fn. 3.) It is obvious that the record here is not "complete" in that sense.

the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case." (40 Cal.3d at p. 541, fn. omitted.)

Stated simply, the jury is "require[d] ... to make a moral assessment on the basis of the character of the individual defendant and the circumstances of the crime and thereby decide which penalty is appropriate in the particular case." (*People* v. *Bonin* (1989) 47 Cal.3d 808, 856 [254 Cal.Rptr. 298, 765 P.2d 460].) In other words, "The jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine, after consideration of the relevant factors, whether under all the circumstances 'death is the appropriate penalty' for the defendant before it." (*People* v. *Myers* (1987) 43 Cal.3d 250, 276 [233 Cal.Rptr. 264, 729 P.2d 698] (lead opn. by Grodin, J.).)[2/]

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2. In *Brown* the court construed the final paragraph of section 190.3 as it did for three reasons: (1) to "honor[] the plain language of section 190.3"; (2) to give effect to "the most likely ;constitutional' intent of the drafters"' and (3) to "avoid[] the constitutional difficulties of a finding that the statute permits 'mandatory' death penalties." (40 Cal.3d at p. 544.)

Very recently, in *Boyde* v. *California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190], the United States Supreme Court impliedly held not unconstitutional the final paragraph of section 190.3 to the extent that it requires that "the trier of fact . . . *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances 'outweigh' the mitigating circumstances." (Italics added.) (494 U.S. at pp. ___-___ [108 L.Ed.2d at p. 326, 110 S.Ct. at p. 1196].) In so doing, it relied primarily on *Blystone* v. *Pennsylvania* (1990) 494 U.S. 299 [108 L.Ed.2d 255, 110 S.Ct 1078], which it had decided less than a week earlier.

After careful review, I believe that *Boyde* gives us no reason to reconsider *Brown*.

To be sure, *Boyde* has removed one of the bases on which the court founded its construction of the statutory provision. It now appears that there

In *Brown*, however, the court recognized that a jury might not understand an instruction incorporating section 190.3's mandatory sentencing language in accordance with the construction of the provision that it had adopted. Specifically, the court acknowledged that the statutory language might mislead the jury as to the scope of their discretion to the defendant's prejudice. (40 Cal.3d at p. 544, fn. 17.) A juror might reasonably understand that language to define the penalty determination as "simply a finding of facts" (*id.* at p. 540) or "a mere mechanical counting of factors on each side of the imaginary 'scale'" (*id.* at p. 541). In other words, he might be misled as to the nature of the process by which penalty is determined. A juror might also reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation — even if he concludes that death is not the appropriate penalty under all the circumstances. (See *id.* at pp. 540-544.) That is to say, he might be misled as to the character of the ultimate question to be resolved in the process of determining penalty.

In deciding whether an instruction incorporating section

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are no "constitutional difficulties" inherent in a "statute [that] permits 'mandatory' death penalties." (40 Cal.3d at p. 544.)

But *Boyde* has had no effect whatever on the two other bases, i.e., "the plain language of section 190.3" and "the most likely 'constitutional' intent of the drafters" (40 Cal.3d at p. 544). Obviously, that decision does not change the words of the statutory provisions or their meaning. Moreover, it contains nothing to support a conclusion that the drafters of the provision may have intended to "anticipate" the law as stated therein. The primary authority on which *Boyde* relies–i.e., *Blysotone*–dates to 1990. By contrast, the drafters of section 190.3 did their work more than a decade earlier.

In my view, the construction of the final paragraph of section 190.3 that the court adopted in *Brown* retains its validity. From the reasoning in that decision it is manifest that the basis of statutory language and the drafters' intent are sufficient to support the interpretation set forth therein. Accordingly, *Boyde's* removal of the "avoidance of constitutional difficulties" basis is without effect for purposes here.

190.3's mandatory sentencing language would constitute error in a given case, the court has applied the so-called "reasonable juror" standard, which was suggested in Brown itself: could a juror have reasonably understood the charge to carry a meaning that was contrary to the governing law?[3/]

In this case, the trial court's instruction on the determination of penalty might indeed have misled the jury as to the scope of their discretion to defendant's prejudice. A reasonable juror could have understood the charge as requiring him simply to determine whether aggravating circumstances outweighed mitigating and then fix the penalty as the mandatory sentencing language directed. Review of the record discloses the

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3. In *People* v. *Marshall* (1990) 50 Cal.3d 907, 933, footnote 5 [269 Cal.Rptr. 269, 790 P.2d 676], the court stated as follows: "In *Boyde* v. *California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190], the United States Supreme Court held that 'The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence' under the Eighth Amendment 'is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.' (*Id* at pp. ___, ___ [108 L.Ed.2d at p. 329].) *It appears to follow that the same satandard is applicable for reviewing jury instructions claimed to restrict impermissibly a jury's sentencing discretion under the Eighth Amendment."* (Italics added.)

That the so-called "reasonable likelihood" standard may apply to a claim that a given instruction impermissibly restricted a jury's sentencing *under the Eighth Amendment* does not mean that that test should app;y to a claim--like the present (see fn. 2, *ante*)--that a given instruction impermissibly restricted a jury's sentencing discretion *under section 190.3*. The choice of the relevant standard here is plainly a matter of state law. I would adhere to the "reasonable juror" test. I certainly would not depart from it in favor of the "reasonable likelihood" test--which is manifestly both novel and unsound (*Boyde* v. *California*, *supra*, 494 U.S. at pp. ___, ___ [108 L.Ed2d at pp. 334-341, 110 S.Ct. at pp. 1202-1207] (dis. opn. of Marshall J.)).

following.

To begin with, the trial court instructed the jury in accordance with the mandatory sentencing language of the final paragraph of section 190.3 without material modification. As noted, the statutory provision declares, "the trier of fact ... *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (Italics added.) The instruction stated, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." (Italics added.)

Moreover, in anticipation of the trial court's instruction, the prosecutor in his summation emphasized, and misleadingly explicated, the mandatory sentencing language. Indeed, he used that language to frame the "major premise" of his argument: "If aggravation outweighs mitigation, you *must* impose death. Aggravation does, in fact, outweigh mitigation. Therefore, you *must* impose death."

The prosecutor opened his summation thus.

"Ladies and gentlemen, it now becomes your decision whether the penalty in this case to be imposed on Ronald Lee Sanders shall be death or life in the state prison without possibility of parole.

" * * *

"I know the decision that you have to make is not a pleasant one and I certainly wouldn't want you to take your job lightly. However, on the other hand, you have a sworn duty as jurors in this case to follow the law of this state as the court gives it to you when I have concluded my remarks.

"All of you told us during the jury selection process that you would not relish the idea of returning a death penalty verdict, however, you also told us that you could do so in the proper case.

"It is the law of the State of California that in certain cases the penalty for first degree murder with special circumstances shall be the death penalty.

"This, ladies and gentlemen, is one of those cases, ...

" * * *

"The court will read to you certain aggravating factors and certain mitigating factors which you should take into consideration in making your decision.

"The court will tell you that you should take into account those factors and be guided by those factors in your deliberation, *and then the court will read you a very important instruction which you cannot ignore because of a duty to the People of the State of California as well as the defendant who is on trial here*.

"This instruction reads as follows:

"*If you conclude that the aggravating circumstances in this case outweigh the mitigating circumstances, you shall impose the death penalty*. In other words, you have got to look at the circumstances, the factors that the judge reads to you, make a determination if the aggravating circumstances outweigh the mitigating circumstances.

"*If you conclude that they do, then it is your duty as jurors to return the death penalty in this case.*

"*I emphasize the word 'shall' there because every single aggravating circumstance that the court will read to you is present in this case and there are no mitigating circumstances.*

"There is nothing to weigh because everything falls on one side of the weighing process. Therefore, under the law the proper sentence in this case is in fact the sentence of death." (Italics added.)

The prosecutor then reviewed the statutory penalty factors and the evidence he claimed was relevant thereto. The gist of his argument was that aggravation was present and mitigation was absent.

Finally, the prosecutor closed his summation thus: "I will repeat that instruction to you again. *If you would conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death*. There are no mitigating circumstances in this case, and the proper

penalty is the death penalty." (Italics added.)

In arguing as he did, the prosecutor delivered the message that the law required the jury simply to determine whether aggravating circumstances outweighed mitigating circumstances and then fix the penalty as the mandatory sentencing language directed. That message, of course, was erroneous. It incorrectly described the character of the ultimate question to be resolved in the process of determining penalty: "The jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination ...." (*People* v. *Myers, supra*, 43 Cal.3d at p. 276 (lead opn. by Grodin, J.); see, e.g., *People* v. *Bonin, supra*, 47 Cal.3d at p. 856; *People* v. *Brown, supra*, 40 Cal.3d at p. 541.) To my mind, a reasonable juror could not have ignored the prosecutor's words or missed their import.[4/]

Accordingly, I conclude that the trial court's instruction in accordance with the mandatory sentencing language of the final paragraph of section 190.3 might indeed have misled the jury as to the scope of their discretion to defendant's prejudice. Therefore, I would set aside the verdict of death and reverse the judgment as to penalty. (See, e.g., *People* v. *Farmer* (1989) 47

4. In concluding that the trial court did not commit *Brown* error, the majority rely on a reading o the summation that treats the prosecutor's comments on the mandatory sentencing language as sound and, in any event, discrete and insignificant. In light of the record set out above, such a reading is at the very least dubious. As explained, the prosecutor's remarks framed the "major premise" of his argument for death. Further, they misstated the law. The majority's assertion to the contrary notwithstanding, it is simply not the case that 'for those defendants as to which a jury decides the aggravating circumstances outweigh the mitigating circumstances, the Penal Code provides that the appropriate penalty is death." (Maj. opn., *ante*, at p. 523.) "The jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine, after consideration of the relevant factors, whether under all the circumstance 'death is the appropriate penalty' for the defendant before it." (*People* v. *Myers, supra*, 43 Cal.3d at p. 276 (lead opn. by Grodin, J.).)

Cal.3d 888, 931 [254 Cal.Rptr. 508, 765 P.2d 940].)

III

For the reasons stated above, I would reverse the judgment in its entirety.

BROUSSARD, J.—I dissent. I agree with Justice Mosk that error relating to the instructions and argument at the penalty trial requires reversal of that verdict. (See *People* v. *Brown* (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440].) Two other errors also affect the judgment. First, the use of voter registration lists as the sole source for the master jury list deprived defendant of his constitutional right to trial by a jury drawn from a representative cross-section of the community (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16). Second, the trial court erroneously excluded for cause a prospective juror because of his generalized opposition to the death penalty, despite the lack of any showing that he could not conscientiously perform his duties as a juror in a capital case. (See *Witherspoon* v. *Illinois* (1968) 391 U.S. 510, 519 [20 L.Ed.2d 776, 88 S.Ct. 1770]; *Wainwright* v. *Witt* (1985) 469 U.S. 412, 431 [83 L.Ed.2d 841, 856, 105 S.Ct. 844], *People* v. *Stanworth* (1969) 71 Cal.2d 820, 837 [80 Cal.Rptr. 49, 457 P.2d 889].)

I.

Defendant made a prima facie showing that the system by which jury venires[1/] were selected in Kern County at the time of

1. As the majority notes (maj. opn., *ante*, p. 489, fn. 2), though defendant frames this issue in terms of a challenge to the assembly of the master jury list, defendant, trial court, and the People apparently understood the basis of the motion to be a challenge to the composition of Kern County jury venires.

his trial produced venires that were substantially underrepresentative of the Hispanic population of the community. Defendant argues that this system of jury selection violated his right to a jury drawn from a representative cross-section of the community under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16, of the California Constitution. The majority opinion rejects this argument, citing *People* v. *Bell* (1989) 49 Cal.3d 502, 520-531 [262 Cal.Rptr. 1, 778 P.2d 129].But this case is not the same as *Bell*. That decision required a defendant to prove not only that the system of selecting jurors underrepresented a cognizable group, but also to identify the probable source of the underrepresentation. (See p. 524.) Here defendant has done so, presenting proof that the county selected jurors exclusively from a source — the voter registration lists — known to underrepresent Hispanics. When a defendant does identify the source of the underrepresentation, as has the defendant here, the burden should shift to the prosecution to demonstrate that the particular procedure at issue is justified.

In *People* v. *Harris* (1984) 36 Cal.3d 36 [201 Cal.Rptr. 782 [679 P.2d 433], we held that on the facts of that case, the exclusive use of the voter registration lists as a basis for selecting jurors deprived the defendant of his right to a representative jury. The reason, we explained, is "that there is a large and increasing proportion of the general population that fails to register to vote, and that the proportion of minorities failing to register is larger than that for the general population." (P. 52.) If a minority group fails to register in proportion to its numbers, the county's decision to use the voter registration list as the exclusive source of jurors is a decision that this group will be underrepresented on its juries. Indeed, the Legislature has now recognized that voter registration lists do not yield representative juries, and has mandated counties to supplement those lists in the selection of jury venires.[2/] (See Code Civ.

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2. At the time of defendant's trial, the master jury list in Kern County was compiled through the random selection of names from the county's voter registration list alone. Questionnaires were then sent to those chosen to determine eligibility to serve as jurors. Although there were plans to use the names of those holding driver's licenses to assemble the master jury list in the future, such plans had not yet been implemented at the time of defendant's trial.

Proc., § 197.)

The Sixth Amendment to the United States Constitution and article I, section 16 of the California Constitution guarantee a criminal defendant the right to a trial by an impartial jury drawn from a representative cross-section of the community. (*Taylor* v. *Louisiana* (1975) 419 U.S. 522, 530 [42 L.Ed.2d 690, 698, 95 S.Ct. 692]; *People* v. *Wheeler* (1978) 22 Cal.3d 258, 272 [148 Cal.Rptr. 890, 583 P.2d 748].) This guaranty means that "a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." (22 Cal.3d at p. 277.)

In *Duren* v. *Missouri* (1979) 439 U.S. 357 [58 L.Ed.2d 579, 99 S.Ct. 664], the United States Supreme Court described a defendant's burden in asserting a fair cross-section challenge to a jury venire. The court held that in order to establish a prima facie violation of the fair cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number such persons in the community; and, (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. (P. 364 [58 L.Ed.2d at p. 579]; accord *People* v. *Harris, supra*, 36 Cal.3d 36, 50.)

Defendant in this case based his motion to quash on the testimony presented in three other jury challenges in Kern County Superior Court. (See *People* v. *Cantu*, Nos. 21891, 22229; *People* v. *Robinson*, No. 21518; *People* v. *Streeter*, Nos.22346, 22056, 21910, 21368.) By stipulation, the evidence in these cases was incorporated into the record, and defendant's

motion was submitted on those transcripts.

The majority concede that defendant's showing establishes that "the first prong of the Duren test is clearly satisfied." (See maj. opn., *ante*, p. 491.) Defendant has also satisfied the second and third prongs of the *Duren* test. With regard to the second prong — that the number of members of the cognizable group in the jury pool is not fair and reasonable in relation to the number of its members in the relevant community — defendant showed a "significant disparity based on the use of total population figures."[3/] (See *Harris, supra*, 36 Cal.3d at p. 54.) Under the calculation in *People* v. *Cantu* that Hispanics represented 17.76 percent of the county's adult population (21.95 percent of total population) and 8.3 percent of the jury pool, there is an absolute disparity of 9.46 percent and a comparative disparity of minus 114 percent (or approximately 53 percent).

But while under *Harris* the showing based on total population figures is sufficient, defendant here went further and showed that the use of voter registration lists underrepresents the proportion of Hispanics eligible for jury service. The evidence presented in *Cantu* and *Robinson*, and incorporated into this case, showed that Hispanics comprised 16.3 percent of the jury eligible population (as compared to 17.76 percent of the total population), but still only 8.3 percent of the registered voters. Using those figures, there is an absolute disparity of 8 percent and a probability of less than one in one million that the disparity could have occurred by chance.[4/]

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3. Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) 65 Cal.L.Rev. 776, 788-792.

4. The trial court itself recognized a prima facie showing of underrepresentation of Hispanic persons on Kern County jury panels when, in denying defendant's motion to quash, it stated "I do believe that there has been a prima facie showing that there is a disproportionate number of people with Hispanic surnames called for jurors, but I am not sure that means a thing, and as everybody knows by reading the Los Angeles Times and any other publication that there are an enormous number of people in this country illegally or green card-wise [*sic*] who are not really citizens. So, I don't think that really in and of itself means anything." The court's ruling was erroneous both in disregarding the proof of underrepresentation on the basis of allegedly common knowledge about the number of noncitizens in the county and in its finding that there was no showing of systematic exclusion.

First, as we held in *Harris, supra*, 36 Cal.3d 36, a defendant may rely upon total population figures, rather than pinpoint the exact number of people eligible for jury service, to make his prima facie case. The trial court here, like the court in *Harris* (p. 48), erroneously rejected defendant's showing on the grounds that his percentage of Hispanics may have included a large number of people who were not eligible for jury service, and in so doing improperly relieved the state of its burden to refute or justify the underrepresentation.

Second, the trial court ignored the evidence which defendant presented relating to the jury eligible population. Rather the court casually referred to the common knowledge, as reported in the newspaper, that there is "an enormous number" of noncitizens in the United States without recognizing that the evidence that had been presented did take account of that factor.

Finally, defendant has also satisfied prong three of the Duren test, i.e., that the alleged underrepresentation must be due to systematic exclusion of a cognizable group in the jury selection process. (*Duren* v. *Missouri, supra*, 439 U.S. at p. 364 [58 L.Ed.2d at p. 587].) It is here that the majority rests its holding, concluding that defendant failed to make the requisite showing of systematic underrepresentation. The majority err. In my opinion, systematic underrepresentation means only that the disparity is inherent in the particular jury selection process utilized, and not the result of random variations in that system. (*Bell, supra*, 49 Cal.3d at p. 565 (dis. opn. of Broussard, J., citing *Duren* v. *Missouri, supra*, 439 U.S. at p. 367 [58 L.Ed.2d at pp. 588-589].) But even under the majority view in Bell a defendant satisfies this prong by showing a specific element of the selection system which causes that system to underrepresent a cognizable group. Defendant has done so here. Indeed the prosecutor here conceded that if there is underrepresentation of eligible Hispanics on the jury panel — and the evidence makes

it clear that there is — "the only explanation must lie in the fact that this group is underrepresented among registered voters."

The majority reply that the county's system is racially neutral (maj. opn., *ante*, p. 496.) In fact, everyone — this court, the state Legislature, and the county itself — has by now recognized that a jury selection system which relies exclusively on voter registration lists is not racially neutral, and has to be changed.[5/] But the change to a multiple list system took time. The county chose to try defendant under the defective former system, even though that system resulted in racially unrepresentative juries, because it would have cost between $15,000 and $40,000 (less than the cost of this appeal) to put a multiple list system into effect earlier.

As we have explained (see, e.g., *People* v. *Harris*, *supra*, 36 Cal.3d at p. 58), to make a showing of violation of the fair cross-section requirement, defendant need not show that the jury commissioner intended to discriminate against Hispanics. All that need be shown is that the system of selection results in denial of a jury pool representing a fair cross-section of the community. The constitutionally mandated goal is a representative jury, not an unbiased commissioner or a facially neutral selection method. The decisions requiring the accused to show systematic, purposeful discrimination do not nullify others which condemn discrimination stemming from negligence or inertia. The latter recognize that official compilers of jury lists may drift into discrimination by not

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5. The majority quote *United States* v. *Cecil* (4th Cir. 1988) 836 F.2d 1431, which said that "[I]t is sufficient that the system adopted provides a fair cross-section and we find both common sense and precedent establish that *if* the voter registration lists do this they are not tainted by some affirmative form of discrimination." (Pp. 1448-1449, italics added.) Clearly this and other cases cited by the majority are not authority that voter registrations lists may be used as an exclusive source for jury selection *fi* they do *not* provide a fair cross-section. We cannot expect perfection, as *Cecil* says (*ibid.*), but surely we can do better than the 53 percent comparative disparity shown here.

taking action to prevent it. In formulating a panel for a jury, officials must adhere to a standard more stringent than mere abstention from intentional discrimination; they have an affirmative duty to develop and pursue procedures aimed at achieving a fair cross-section of the community. (*Avery* v. *Georgia* (1953) 345 U.S. 559, 561 [97 L.Ed. 1244, 1247, 73 S.Ct. 891]; *Akins* v. *Texas* (1945) 325 U.S. 398, 403 [89 L.Ed. 1692, 1696, 65 S.Ct. 1276].)

Evidence of a regular and notable disparity led the United States Supreme Court in *Duren*, *supra*, 439 U.S. 357, and this court in *Harris*, *supra*, 36 Cal.3d 36, to conclude that the cause of the underrepresentation was inherent in the jury selection process. Here defendant showed more than notable disparity. Here defendant demonstrated that the underrepresentation of Hispanics is due to the selection of jurors solely from voter registration lists. I would hold that defendant has adequately met the third prong of the *Duren* test, showing systematic exclusion of Hispanics in the jury selection process.

The right to be vindicated here is the right to a trial by a jury drawn from a fair cross-section of the community. It goes to the very heart of the integrity of the fact-finding process — the impartiality of the jury. As we recognized in *People* v. *Wheeler*, *supra*, 22 Cal.3d 258, 276, "[T]he primary purpose of the representative cross-section requirement ... is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences." When, as here, Hispanics are underrepresented on jury venires, just as when, in *Wheeler*, Blacks were peremptorily struck, "such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority." (*Ibid.*)

Nowhere is a representative jury more critical than in a capital case. In such cases the jury not only resolves the question of guilt or innocence but also serves as the conscience of the community in its most compelling role: it decides whether a person shall live or die. In this life or death

determination the interplay of diverse values and views is imperative if a fair and impartial judgment is to be rendered. A just decision in a capital case requires that people of all the different ethnic, racial and religious groups in our society have an equal chance at being selected as jurors. Defendant was denied that right in this case.

II.

In addition to its error in rejecting defendant's prima facie showing of unconstitutionally unrepresentative jury, the trial court also erred in excluding one juror on the basis of his generalized opposition to the death penalty.

As required by *Hovey* v. *Superior Court* (1980) 28 Cal.3d 1 [168 Cal.Rptr. 128, 616 P.2d 1301], jurors were questioned separately to determine their views on the death penalty. The voir dire to determine whether Juror Giangregorio was eligible to sit on a capital jury was extremely brief:

"Q: How do you feel about the death penalty?

"A: I am against it, your Honor.

"Q: Are you against in it every case?

"A: Every instance. I do not believe in it." Over defense objection and without further questioning, the court then granted the prosecutor's motion to exclude the juror for cause.

Under *Wainwright* v. *Witt, supra*, 469 U.S. 412, a juror may be excluded because of his views on capital punishment only if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (P. 424 [83 L.Ed.2d at pp. 851-852], quoting *Adams* v. *Texas* (1980) 448 U.S. 38, 45 [65 L.Ed.2d 581, 100 S.Ct. 2521].) The burden of showing that the juror should be excluded is on the party seeking exclusion. (*Witt, supra*, at p. 423 [83 L.Ed.2d at p. 851].) Deference is due to the trial judge who sees and hears the juror (p. 426 [83 L.Ed.2d at p. 853]); thus the issue on review is whether the judge's findings "are fairly supported by the record." (P. 434 [83 L.Ed.2d at p.

858]; see *Darden* v. *Wainwright* (1986) 477 U.S. 168, 176 [91 L.Ed.2d 144, 154, 106 S.Ct. 2464].)

The brief, unsearching colloquy with Juror Giangregorio is wholly insufficient to show that "[his] views would prevent or substantially impair the performance of his duties in accord with his instructions and his oath." (*Wainwright* v. *Witt, supra*, 469 U.S. 412.) Instead, it appears that the trial court simply excluded the juror based on the juror's opposition in principle to the death penalty. *Witherspoon* v. *Illinois, supra*, 391 U.S. 510, expressly held that political, religious, or philosophical opposition to capital punishment is insufficient to disqualify a juror. While *Wainwright* v. *Witt, supra*, 469 U.S. 412, repudiated as dictum the rigid test set out in footnote 21 of *Witherspoon*, it expressly reaffirmed Witherspoon's holding that the exclusion of a juror on the bias of a generalized opposition to capital punishment was unconstitutional.

Witherspoon v. *Illinois, supra*, 391 U.S. 510, involved a statute which provided that in capital cases "it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or *that he is opposed to the same*." (P. 512 [20 L.Ed.2d at p. 779], italics added.) Acting pursuant to that statute, the trial court excused six jurors who "said that they did not 'believe in the death penalty' ... without any attempt to determine whether they could nonetheless return a verdict of death." (P. 514 [20 L.Ed.2d at pp. 780-781].) The United States Supreme Court found the exclusion of these jurors from the penalty jury unconstitutional, declaring that "[One] who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror .... [W]hen [the State] swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." (Pp.

519-521 [20 L.Ed.2d at pp. 783-784].) "[W]e hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Pp. 522-523 [20 L.Ed.2d at pp. 784-785], fn. omitted.)

In footnote 21 of *Witherspoon* v. *Illinois (supra*, 391 U.S. 510), the court proposed a specific test: jurors could be excluded only if they "made unmistakably clear ... that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (P. 522, fn. 21 [20 L.Ed.2d at p. 785].) This language became the "*Witherspoon* test" as applied in the courts of this and other states. (See, e.g., *People* v. *Velasquez* (1980) 26 Cal. 3d 425 [162 Cal.Rptr. 306, 606 P.2d 341].)

In *Wainwright* v. *Witt, supra*, 469 U.S. 412, the court rejected the *Witherspoon* test in favor of the one originally set out in *Adams* v. *Texas, supra*, 448 U.S. at page 45 [65 L.Ed.2d at pages 589-590]. It acknowledged, however, that its standard "leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." (*Witt, supra*, 469 U.S. at p. 421 [83 L.Ed.2d at p. 850].) This language makes it clear that even after *Witt*, opposition to capital punishment by itself is still insufficient to justify removal of a juror. Thus, *Witt* reaffirmed that *Witherspoon* was correctly decided on the facts of that case.[6] Confirming this conclusion, *Witt* described *Witherspoon*

6. Likewise, the court apparently agreed that two post-*Witherspoon* cases (*Maxwell* v. *Bishop* (1970) 398 U.S. 262 [26 L.Ed.2d 221, 90 S.Ct. 1578] and *Boulden* v. *Holman* (1969) 394 U.S. 478 [22 L.Ed.2d 433, 89 S.Ct. 1183]), both of which applied the *Witherspoon* formula in overturning death penalties, were correctly decided, since its decision distinguishes them in part on the ground that "both involved jurors who were excused merely because they had 'conscientious' objections to, or did not 'believe in,' the death penalty." (*Will, supra*, 469 U.S. at p. 422, fn. 4 [83 L.Ed.2d at p. 850].)

as representing a necessary balance between a defendant's right to a jury drawn from a fair cross-section of the community and the prosecutor's right to remove a biased juror, and stated "[W]e adhere to the essential balance struck by the Witherspoon decision in 1968 ...; we simply modify the test stated in *Witherspoon*'s footnote 21 to hold that the State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of the duties in accordance with their instructions or their oaths." (P. 424, fn. 5 [83 L.Ed.2d at p. 852].)

The California cases following *Wainwright* v. *Witt, supra,* 469 U.S. 412, illustrate the circumstances under which a juror can be excluded because of his views on capital punishment. In *People* v. *Miranda* (1987) 44 Cal.3d 57, 95 [241 Cal.Rptr. 594, 744 P.2d 1127], the juror asserted that she would "'never vote for a verdict of death.'" In *People* v. *Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467, 755 P.2d 917], one juror said his mind was a "closed book," and that he was not sure he could conceive of a crime so heinous that he would vote for death. (P. 955.) Upon further questioning he affirmed that he would never vote for the death penalty. (*Ibid.*) Another juror said, "I guess conscientiously I would have to say that I would absolutely vote for the life without parole." Asked if she would ever so vote "automatically", she replied, "'I would have to say that I would.'" (P. 956.) In *People* v. *Howard* (1988) 44 Cal.3d 375, 418 [243 Cal.Rptr. 842, 749 P.2d 279], each excluded juror "unqualifiedly stated he or she would not vote to impose death." In *People* v. *Coleman* (1989) 48 Cal.3d 112, 137 [255 Cal.Rptr. 813, 768 P.2d 32], the juror, asked if she would automatically

vote against first degree murder, replied, "'I'm afraid I would avoid the death penalty. I would vote so that I wouldn't have the death penalty on my mind.'" In *People* v. *Walker* (1988) 47 Cal.3d 605, 624 [253 Cal.Rptr. 863, 765 P.2d 70], the juror asserted that she would vote against the death penalty "'regardless of what the facts might be in this case.'"In *People* v. *Boyde* (1988) 46 Cal.3d 212 [250 Cal.Rptr. 83, 758 P.2d 25], a juror was asked whether he could under any circumstances return a death verdict; he responded, "I can't do it, sir." (P. 245.) Another juror said he would not impose the death penalty regardless of the severity of the aggravating evidence. (*Ibid.*) A third juror said the only case in which she might vote for death would be one involving the murder of her own child. (P. 246.) In sum, whenever we have upheld the exclusion of a juror, that juror has said something which indicates that he could not decide the case impartially on the evidence and relevant factors, but instead that his vote was predetermined by his views on the death penalty.

With these precedents in mind, it is instructive to look again at the voir dire of Juror Giangregorio. He was first asked, "How do you feel about the death penalty?" and replied, "I am against it, your Honor." This is the sort of generalized opposition to capital punishment which is clearly insufficient to disqualify a juror under *Witherspoon, supra*, 391 U.S. 510, *Wainwright* v. *Witt, supra*, 469 U.S. 412, or any California precedent. The judge then asked, "Are you against it in every case." The juror replied, "Every instance. I do not believe in it." This second answer adds nothing, because a person who is against the death penalty is, by definition, opposed to it in every instance. One who favors the death penalty in some cases but not in others is considered a supporter of the death penalty. The court asked Giangregorio only whether he was "against" the death penalty "in every instance," not whether he could apply the law if he concluded that under the law the death penalty was appropriate. The juror's answer, "I do not believe in it," is again just a general statement of belief, not an expression of whether his

ability to apply the law would be impaired.

The majority opinion, however, asserts that "Giangregorio's expressed antipathy to the death penalty in 'every instance' ... would undoubtedly 'substantially impair the performance of his duties as a juror.'" (Maj. opn., *ante*, at p. 503.) This assertion is squarely inconsistent with the language in *Witherspoon* where the court declared that "[One] who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." (*Witherspoon* v. *Illinois, supra*, 391 U.S. 510, 519 [20 L.Ed.2d 776, 783].) As we have seen, this portion of *Witherspoon* was not overturned by *Wainwright* v. *Witt, supra*, 469 U.S. 412, and remains controlling law.

For the foregoing reasons, I would reverse the judgment and remand this case for a new trial.

Appellant's petition for a rehearing was denied November 28, 1990.

California Penal Code, section 190.2 and 190.3

Section 190.2

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered and the defendant knew or reasonably should have know that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section

830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of

record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof

of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in the state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Section 190.3

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, and a special has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code of Sections 27, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or

violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or

violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. (*Added by § 8 of Initiative Measure approved Nov. 7, 1978.*)

District Attorney Penalty Argument - RT 1912-1919
Superior Court of the State of California
In and For the County of Kern, No. 22079

MR. TAUZER: Yes. May I have the podium?

THE COURT: Mr. Tauzer is going to make a closing statement to you. Remember what he says as a lawyer is not evidence.

Mr. Tauzer.

MR. TAUZER: Ladies and gentlemen, it now becomes your decision whether the penalty in this case to be imposed on Ronald Lee Sanders shall be death or life in the state prison without possibility of parole.

He, as you know, has been found guilty of first degree murder of Janice Allen. You have found four special circumstances in this case, that the murder was perpetrated during the commission of a robbery, the murder was perpetrated during the commission of a burglary, the murder was committed to prevent the testimony of Janice Allen at some future criminal proceeding, and the murder of Janice Allen was especially heinous, atrocious and cruel, exhibiting exceptional depravity.

I know the decision that you have to make is not a pleasant one and I certainly wouldn't want you to take your job lightly. However, on the other hand, you have a sworn duty as jurors in this case to follow the law of this state as the court gives it to you when I have concluded my remarks.

All of you told us during the jury selection process that you would not relish the idea of returning a death penalty verdict, however, you also told us that you could do so in the proper case.

It is the law of the State of California that in certain cases the penalty for first degree murder with special circumstances shall be the death penalty.

This, ladies and gentlemen, is one of those cases. I want to emphasize to you that the decision you have to make at this point relates to Ronald Lee Sanders alone. The case of John

Cebreros, Jr. is not before you here and may be quite another matter. You have to make a decision on Mr. Sanders at this point and not as to the other defendant.

As the judge told you at the beginning of the testimony this morning, these are two separate cases and these two individuals should be treated separately.

The court will read to you certain aggravating factors and certain mitigating factors which you should take into consideration in making your decision.

The court will tell you that you should take into account those factors and be guided by those factors in your deliberation, and then the court will read you a very important instruction which you cannot ignore because of a duty to the People of the State of California as well as the defendant who is on trial here.

This instruction reads as follows:

If you conclude that the aggravating circumstances in this case outweigh the mitigating circumstances, you shall impose the death penalty. In other words, you have got to look at the circumstances, the factors that the judge reads to you, make a determination if the aggravating circumstances outweigh the mitigating circumstances.

If you conclude that they do, then it is your duty as jurors to return the death penalty in this case.

I emphasize the word "shall" there because every single aggravating circumstance that the court will read to you is present in this case and there are no mitigating circumstances.

There is nothing to weigh because everything falls on one side of the weighing process. Therefore, under the law the proper sentence in this case is in fact the sentence of death.

I would like to go through these factors with you.

The first one the judge will tell you about is the circumstances of crimes of which the defendant was convicted in this case and the existence of any special circumstances found to be true.

The murder of Janice Allen as you know, was willful and premeditated. It was a cold, calculated, callous act. You have

already concluded and correctly so that it fell within the special circumstance known as especially heinous, atrocious and cruel murder, that it exhibited exceptional depravity, that it was a consciousless, pitiless act committed against a young, defenseless woman in the prime of her life.

It's hard, as I mentioned to you during my first argument some weeks ago, it's hard to imagine a murder that would be more cold blooded or more brutal than the one that we have in this case. We cannot bring Janice Allen back to life by your verdict here and we are not here certainly to avenge her death. But we do ask you to bring back a verdict that is proper in this case under the law of this state and not to ignore your sworn duty to the People of the State of California.

You can also consider not only the brutal murder of Janice Allen, but the vicious attack on Dale Boender two days before and equally vicious attack on him on the night of the murder of Janice Allen. Those are circumstances and factors which you certainly should in this case.

The second aggravating circumstance that the judge will tell you to consider is the presence or absence of prior criminal activity by the defendant Ronald Lee Sanders which involved the use or attempted use of force or violence.

Such criminal activity is certainly present in this case. We have shown that through the testimony today of James Quinn, Thomas Ferguson, Fred Turnbull and Sammy Mitchell, each of whom was the victim of robbery by Mr. Ronald Lee Sanders in 1970.

The robbery of Dale Boender and Janice Allen this year or last year, 1981, was not a unique event in the life of Ronald Lee Sanders.

I could not help but think when I listened to the testimony of James Quinn this morning regarding the robbery of himself and his wife, how lucky they were to have escaped unharmed back when they confronted Mr. Sanders back in 1970.

I think it's important to note that in these prior robberies as in this case, Mr. Sanders was the leader. He was the one who

carried the gun. He was the one who give the orders.

Thirdly, the court will tell you that there is an aggravating circumstance which is the presence or absence of any prior felony conviction.

Again, that is present in this case as an aggravating circumstance. As you heard, Mr. Sanders was arrested by Sgt. Fred Nourise of the Fountain Valley Police Department on December 9, 1970 for the robbery of a Seven-Eleven Store in that city. He pled guilty to armed robbery in the Orange County Superior Court and on March 4, 1971, he was sentenced to the Department of Corrections.

A certified copy of that conviction is present in evidence here. He stayed in prison until I believe December 12, 1973.

Now, in some cases there may be mitigating circumstances, but they are not, as I mentioned to you, present in this case. Number one, the judge will tell you you can consider whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional distress. There is absolutely zero evidence of that in this case.

The robberies of James Quinn and Thomas Ferguson and Fred Turnbull and Sammy Mitchell in 1970 show beyond a doubt that the defendant, Mr. Sanders, is capable of cruel, calculating criminal activity. He acted the same way then that he acted when it tried to rob Dale Boender on January 21st, when he attempted to murder Dale Boender on January 23rd and when he did in fact take the life of Janice Allen.

Another possible mitigating circumstance is whether or not the victim was somehow a participant in the defendant's homicidal act or consented to the act in some way, and that certainly doesn't apply here. As I mentioned to you in my argument a week and a half ago, we may not approve of the lifestyle of Janice Allen, but she certainly did not deserve to die in the manner that she did.

Next, another possible mitigating circumstance is whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or

extenuation of his conduct. This is not a mitigating circumstance that we have in this case. There was no moral justification for the crimes that Mr. Sanders committed and Mr. Sanders did not believe that there was.

Next, you would in a proper case consider the defendant, whether or not the defendant acted under extreme duress or under the extreme domination of another person. That fact is not present in this case. In fact, the opposite is true. Mr. Sanders did plan the robbery of Dale Boender on Wednesday at Brenda Maxwell's house. He is the one that said Boender had to be taken care of and he is the one that recruited Mr. Cebreros to help him in that murder. He is the first one to rush into the apartment at 4317 Columbus with a gun in his hand and he was in fact, as he was in his prior crimes, the leader not the follower.

If anybody acted under the domination of another, it was Mr. Cebreros, not Mr. Sanders.

The next possible mitigating factor in the case that the judge will tell you about is whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or extreme intoxication.

There is absolutely again zero evidence of any such mitigating factor in this case. The judge will tell you that you could consider the age of the defendant at the time of the crime as a mitigating factor.

In a proper case, I suppose that might be a consideration if the defendant was just barely 18 years of age or 92 years of age. But we have a man here who was born on April 23, 1951. He was 29 years old at the time of the crime, just about the same age as Janice Allen was in fact. In fact about the same age he was when he took her life.

Certainly old enough to know better, especially since he had been through the California Department of Corrections one time, and certainly his age is no factor for your consideration in one way or the other.

Then the judge will tell you in the appropriate case another appropriate mitigating factor may be whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

We cannot believe that based on the evidence. That, as I mentioned before, may be the case as to John Cebreros but it certainly is not the case as to Ronald Lee Sanders.

The killing of Janice Allen and the attempted murder of Dale Boender was his plan, one planned by him and one primarily carried out by him. We know that he is very capable of that offense, if for nothing more from the evidence that he came around and smashed Dale Boender with that club two days before and he was back on the night of the murder.

All the evidence in this case an everything we know about Ronald Lee Sanders tells us that he was the major actor in this particular crime.

Finally, the judge will tell you that you can consider any other circumstances which extenuates the gravity of the crime, and I have heard no evidence of any such thing in this case and know none. There are no other extenuating circumstances.

I will repeat that instruction to you again. If you would conclude that the aggravating circumstances outweigh the mitigating circumstance, you shall impose the sentence of death. There are no mitigating circumstances in this case, and the proper penalty is the death penalty.

Thank you.

Instructions to the Jury - RT 1919-1922
Superior Court of the State of California
In and For the County of Kern, No. 22079

THE COURT: Ladies and Gentlemen, in the first phase of this trial you were given some general instructions concerning the standards by which the credibility of the witness was to be weighed and how evidence was to be evaluated. It won't be necessary for me to repeat all those general instructions which I earlier gave to you.

You are reminded that you are to be guided by the previous instructions given in the first phase of the case which are applicable to this particular phase of the case.

I also want to remind you again that it is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify, and you must not draw any inference from the fact that he does not testify.

Further, you must neither discuss this matter nor permit it to enter your deliberations in any way. The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under one or more of the special circumstances has been specially found to be true.

It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the circumstances charged in this case have been specially found to be true.

It is also the law of this state that the penalty for a defendant found guilty of murder in the first degree who did not commit the act or acts causing the death but who intentionally aided, abetted, counselled, commanded, induced, solicited, requested or assisted in the commission of a murder in the first degree shall suffer death or life without possibility of parole in any case in which the special circumstances charged in this case have been found to be true.

Under the law of this state, you must now determine which

of those penalties shall be imposed on this defendant.

In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors if they are applicable:

A, circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

B, the presence or absence of any criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

C, the presence or absence of any prior felony conviction.

D, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

E. whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

F, whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

G, whether or not the defendant acted under extreme duress or under the substantial domination of another person.

H, whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

I, the age of the defendant at the time of the crime.

J, whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

And, K, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

It is now your duty to determine which of the two penalties,

death or confinement in the state prison for life without possibility of parole shall be imposed on this defendant.

After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

Evidence has been introduced to show that the defendant, Ronald Lee Sanders, one, has been convicted of a felony and, two, that he has committed prior criminal acts which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

Before you can consider any of these facts as aggravating circumstances in this case, you must be convinced beyond a reasonable doubt that they are true. You shall now retire and select one of your number.

Jury Note - RT 1927-1929
Superior Court of the State of California
In and For the County of Kern, No. 22079

Bakersfield, California, February 3, 1982, 10:05 A.M.

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THE COURT: The record will reflect that we return to the People versus Ronald Lee Sanders and he is present. He is accompanied by his counsel. Frank Hoover and Stephen Tauzer represent the People.

I have a note from the jury, what are the consequences if the jury is unable to arrive at a unanimous decision?

My answer to you is that your decision has to be unanimous and if you cannot arrive at a decision, then that fact that you cannot arrive or the consequences of it should not be considered by you at all.

Does that answer your question, Miss McCollum?

In other words, you shouldn't consider your question at all. Okay.

Secondly, may we have a copy of the jury instructions and, yes, you may and we have it. But let me read the instruction to you.

The written instructions which I have previously read to you are going to be made available to you in the jury room pursuant to your request. They must not be defaced. You will find that the instructions may be either printed, typewritten or handwritten. Some of the printed or typewritten instructions may be modified by typing or handwriting. Blanks and printed instructions may be filled in by typing or handwriting and certain portions of printed or typweritten[sic] instructions may have been deleted by lining out.

You are not to be concerned with the reasons for any of these modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either as to

what it was or as to the reason for its deletion.

Every part of an instruction whether it's printed, typed or handwritten is of equal importance. You are to be governed only by the instruction in its final wording, whether or not it is printed, typed or handwritten. And I assume, Miss McCollum, that you are only asking for the last instructions that I read to you.

FOREMAN McCOLLUM: Yes.

THE COURT: Any other questions?

FOREMAN McCOLLUM: I guess not.

THE COURT: Mr. Bailiff, would you mind handing those instructions to Miss McCollum and I will ask the clerk to make the note a part of our record.

(Whereupon the jury is ushered out of the courtroom.)

Bakersfield, California, February 3, 1982, 10:35 A.M.

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THE COURT: The record will reflect that we return to the People versus Sanders. He is present and accompanied by his attorney, Frank Hoover. Stephen Tauzer represents the People and the jurors are in their proper places.

Ladies and gentlemen of the jury, have you reached a verdict in this case?

FOREMAN McCOLLUM: Yes.

THE COURT: Madam Clerk, would you read the verdict, please.

THE CLERK: People of the State of California, plaintiff versus Ronald Lee Sanders.

Verdict, February 3, 1982, we the jury impaneled to try the above entitled cause, having found the defendant, Ronald Lee Sanders, guilty of first degree murder and having found special circumstances in this case to be true do hereby determine that the penalty shall be death. Signed Lisa McCollum, foreman.

Trial Court Automatic Review Hearing, 3-3-82 RT 27-30
Superior Court of the State of California
In and For the County of Kern, No. 22079

And, now, the Court will turn to Count 1 and pursuant to the provisions of Section 190.4(e), there is automatic appeal to this court after the jury verdict concerning the penalty of death, and, as I understand it, the court must make a review of the facts and circumstances of the case and make an independent judgment as to whether or not the penalty of death should be imposed and, in that regard, I will ask the reporter to transcribe the remarks that I have made in this regard and to make them a part of the minutes of this court.

Needless to say, the Court has thought a great deal about this, but I will find that the evidence shows that this was a deliberate killing and attempted killing of two helpless people, both of them bound hand and foot, both of them blindfolded and that the killing and the attempted killing was for the purpose of robbery and for the purpose of burglary and for the purpose of silencing these two people so they could not later be witnesses should a criminal proceeding be filed.

I think that the evidence in this case establishes beyond a reasonable doubt and to a moral certainty that Ronald Lee Sanders committed all of the crimes, that it was a willful, premeditated, deliberate killing and attempted killing.

I cannot find any circumstances in mitigation in this case that should cause the Court to upset the decision of the jury. There simply are none.

The Court finds that the special circumstances which the jury found are true beyond a reasonable doubt and to a moral certainty. I truly believe that the killing and attempted killing was done to rob Mr. Boender and Miss Allen, that it was done in the commission of the act of burglarizing their home, that it was done to silence both of them and, yes, even that it was heinous and atrocious and cruel.

There is something inhuman about beating someone to death

in the head while they are bound hand and foot, blindfolded, so the Court finds that the jury's verdict and findings are not contrary to the law. They are not contrary to the evidence presented in this case, so the Legislature told me to make an independent review of this matter and I have done it and I would have reached the same decision on each and every count and finding that the jury did in this case.

This man is a menace to society, so, therefore, Ronald Lee Sanders, it's the judgment and sentence of this Court that for the offense of murder, as charged in this information and of which you have previously been found guilty, the jury having further found four special circumstances, that the murder was in the course of a robbery, the murder was in the course of a burglary, that the murder was accomplished to silence a witness, that the murder was especially heinous, atrocious and cruel, the jury previously having told this Court that the penalty should be death and the court having now denied your motion for a new trial and the Court having considered anew and automatically your petition, which is made for you by the People of the State under 190.4(e), it is this Court's determination that you shall suffer death.

This penalty is to be inflicted within the walls of the state penitentiary at San Quentin and in the manner prescribed by law at a time to be fixed by this court pursuant to order of execution.

At this time, therefore, sir, you are remanded to the care, custody and control of the sheriff of this county, and he is ordered to deliver you to the warden of the state penitentiary at San Quentin within ten days from this date in the usual course of his duty for the execution of the sentence on the offense of murder in the first degree, which has been contained in the information and of which you have been found guilty and special circumstances having been found to be true.

The warden at San Quentin is ordered to hold you there pending final determination of your appeal in this matter, which is automatically now through the California Supreme Court, and the sentence will be executed upon the final determination on

appeal.

Informal Response to Petition for Writ of Habeas Corpus, P. 186
California Supreme Court, No. S043131

XLII.

THIS COURT'S REVIEW OF THE PENALTY AFTER INVALIDATING TWO OF THE SPECIAL CIRCUMSTANCES WAS PROPER

Petitioner claims that this Court violated his constitutional rights in affirming his death penalty sentence after invalidating two of the four special circumstances because the opinion does not show that this Court applied a harmless-beyond-a-reasonable-doubt error test or reweighed the aggravating and mitigating circumstances. Petitioner cites no authority for these two claims and, indeed, if they could be raised, they lack merit.

While the more stringent test of error may be required, in this instance, as is clear from both the appellate record and this Court's holding, the death penalty would be affirmed under either test. (*People v. Mickey, supra,* 54 Cal.3d 612, 703.) Since the impact of the two invalidated special circumstances was "benign" because the prosecutor did not argue the bare number of circumstances and focused on the brutal facts, which were the same and entitled to the same weight without the two invalidated special circumstances, there could be no prejudice under either harmless either test, just as there was not in *People v. Mickey, supra*.

As to petitioner's claim that this Court erred by not reweighing the aggravating and mitigating evidence, no such reweighing is constitutionally required before a death penalty can be affirmed in these circumstances where some special circumstances are invalidated but other, valid special circumstances remain. (*Clemmons*[sic] *v. Mississippi* (1990) 494 U.S. 738, at 741 and 754.)

There were no constitutional infirmities in this Court's

affirmance of the death penalty after invalidating two of the four special circumstances.

RT 1526
Superior Court of the State of California
In and For the County of Kern, No. 22079
(Excerpt from District Attorney's Guilt Phase Closing Argument)

Dale Boender was formed at that very point, that very time on Wednesday, January 21st.

Now, next we ask ourselves, although it may not be that legally significant at this point, but we should ask ourselves, who did the actual killing. They say that it's not too significant at this point because, as I discussed with you before an aider and abettor is just as liable as the actual killer. We have no direct evidence as to who did the actual beating of Janice Allen.

Mr. Sanders and Mr. Cebreros made sure that there were no eyewitnesses to the crime. We do have circumstantial evidence. Circumstantial evidence is evidence on which we can draw logical inferences. It could have been Mr. Sanders that smashed the skull of Janice Allen. It could have been Mr. Cebreros. It could have been both of them. It is clear, however, from this evidence that the killing of Janice Allen did not occur without the cooperation of both of these men. If only one man wielded the actual murder weapon, I submit to you there is strong circumstantial evidence that it was in fact Ronald Sanders. This was Mr. Sanders' method of operation. He had proved it two days before.

At Brenda Maxwell's mobile home on Wednesday, he had delivered a series of right-handed blows with full force which caught Dale Boender on the left side of his body in his neck, in his left forearm and in this rib cage. We know that he is capable of smashing a human being at full force with a club and I submit to you that not many human beings are capable of doing that.

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Also, the instruction does not enhance her truthfulness in any respect; at most, it merely fails to further underscore her lack of reliability. This is what distinguishes this case from People v. Dail (1943) 22 Cal.2d 642, cited by appellant (AOB 135), where the judge at one point told the jury to distrust the accomplice's testimony and, at another point, contradictorily told the jury to judge their testimony by the same standard applied to other witnesses' testimony. The reversal was based on the erroneous instruction by the conflict caused by the two inconsistent instructions.

Here, there was a proper instruction which was never contradicted or retracted, and the gist of the instruction--that jurors should be wary of Ms. Maxwell's credibility on every topic--was emphasized by the several different ways in which the jury was made aware that truthfulness was not her long suit. There was no error and, alternatively, any error was harmless.

Appellant's second complaint about the accomplice instruction is similarly meritless because Ms. Maxwell was not an accomplice as a matter of law to the robbery, burglary, attempted murder, and murder which occurred on January 23, 1981.

An accomplice is someone "who is liable to prosecution for the identical offense charged against the

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goes, the non-killing accomplice does not necessarily have intent to kill[13/] and since the record does not show which assailant--appellant or Cebreros–killed Ms. Allen, neither one can be subject to the felony murder special circumstance. Under the facts particular to this case, his reasoning fails.

Respondent agrees that it is unclear who personally killed Ms. Allen. But regardless of whether it was Cebreros or appellant, the intent to kill is inextricably linked to appellant. In People v. Garcia, supra, Garcia did not kill the victim--he was the "wheel man" in an armed robbery where the gunman, Garcia's young nephew, went into a liquor store, panicked, and fatally shot the clerk. Garcia knew that the nephew was armed but, of course, did not know the nephew would kill the clerk.

Similarly, in Carlos, supra, Carlos and his crime partner, who were both armed, robbed a grocery store. As they fled, they were confronted by an off-duty deputy sheriff; the crime partner and the deputy engaged in a gun battle while Carlos ran for the getaway car. During the melee, the deputy sheriff's young daughter was fatally injured by bullet fragments which probably came from the

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13. Appellant does not contend nor does the law provide that a non-killing accomplice who intended to kill is not subject to the death penalty. The law is quite explicit that, if he has the appropriate intent, an accomplice may suffer a capital penalty (Pen. Code, § 190.2(b)).

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No. 04-980

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE
QUESTIONS PRESENTED

1. Is the California death penalty statute a "weighing statute," meaning the state court is required to determine that the presence of an invalid special circumstance, as part of one factor in the sentencing phase, was harmless beyond a reasonable doubt as to the jury's determination of the penalty?

2. If the first question is answered affirmatively, was it necessary for the state Supreme Court to specifically use the terms "harmless error" or "reasonable doubt" in determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-980

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) is reported as *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004). (Joint Appendix, hereinafter JA, 3-31.) The opinion of the California Supreme Court affirming Sanders' death sentence is reported as *People v. Sanders*, 51 Cal.3d 471 (1990). (JA 32-135.)

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on July 8, 2004. A petition for rehearing and rehearing en banc was denied on October 13, 2004. The state's petition for writ of certiorari was filed on January 11, 2005, and granted on March 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

California's capital sentencing scheme is set out, in relevant part, in California Penal Code sections 190.2 and 190.3, reprinted in the Joint Appendix at pages 136-142.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any state deprive any person or life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. California's Capital Sentencing Scheme

In California, a defendant is eligible for the death penalty when the jury finds him guilty of first-degree murder and finds one of the special circumstances listed in California Penal Code section 190.2 to be true.[1] Following that determination, a defendant's case proceeds to a separate penalty phase where the trier of fact determines whether to impose death or life imprisonment without the possibility of parole.

The jury *must* consider all the evidence presented at the various phases of the trial.[2] The jury makes the sentencing determination by "tak[ing] into account . . . if relevant" any of eleven factors contained in a "single list" of "open ended factors" set forth in California Penal Code section 190.3. *Tuilaepa*, 512 U.S. at 978-979.[3] This unitary list of factors in

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1. In California, a "special circumstance" is the equivalent of an "aggravating circumstance," the label this Court uses for the factors which perform the necessary function of narrowing the classification of murderers eligible for the death penalty which "of necessity require an answer to a question with a factual nexus to the crime or the defendant. . . ." *Tuilaepa v. California*, 512 U.S. 967, 972-973 (1994).

2. California Penal Code section 190.4, subdivision (d), provides in pertinent part as follows: "In any case in which the defendant may be subject to the death penalty evidence presented at any prior phase of the trial . . . shall be considered at any subsequent phase of the trial. . ."

3. For sake of clarity, we refer to those eleven factors as "sentencing factors," not to be confused with the special circumstances listed in section 190.2.

section 190.3 is different from the list of special circumstances in section 190.2. *Id.*, at 975.

These eleven sentencing factors include all manner of things concerning the circumstances of the crime, the defendant's mental state and background, his violent crimes, his prior felonies, his age, his relative culpability, "and any other circumstance extenuating the gravity of the crime." The list directs the sentencer's attention to factors relevant to the defendant's "moral culpability." *People v. Bacigalupo*, 6 Cal.4th 457, 469, 475, 477 (1993) (*Bacigalupo II*).

These factors "properly require the jury to concentrate upon the circumstances surrounding both the offense and the offender, rather than upon extraneous factors having no rational bearing on the appropriateness of the penalty." *People v. Jackson*, 28 Cal.3d 264, 316 (1980). "The statutory list of relevant factors . . . 'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty' . . . 'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate." *Pulley v. Harris*, 465 U.S. 37, 53 (1984), quoting *Harris v. Pulley*, 692 F.2d 1189, 1194-1195 (9th Cir. 1982). These factors are not propositions; they merely point the jury to particular subject matters. *Tuilaepa*, 512 U.S. at 975. The list guides the jury "regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

The special circumstances are subsumed within a jury's overall consideration of the "circumstances of the crime." The first of the eleven factors listed in section 190.3, "factor (a)," includes "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." Apart from that reference in conjunction with the general circumstances of the crime, special circumstances have no role

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in section 190.2.

at all in sentence selection in California. The prosecution is only precluded from introducing, as aggravation, evidence of an offender's non-violent conduct that did not result in "non-violent misdemeanors," unadjudicated non-violent felonies, and other "trivial incidents of misconduct and ill-temper." *People v. Boyd,* 38 Cal.3d 762, 774 (1985). This limitation, of course, has no relation to evidence underlying the special circumstances.

Section 190.3 mandates that "the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Otherwise, the sentencer must impose a sentence of life without the possibility of parole. The California Supreme Court has described this process as follows:

> The weighing of aggravating against mitigating circumstances is a mental balancing process, but not one that involves a mechanical counting of factors on either side of some imaginary scale, or the arbitrary assignment of weights to any factor. Rather, . . . a juror faced with making the requisite individualized determination whether a defendant should be sentenced to life without parole or to death is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to each and all of the relevant factors. Moreover, in directing "that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating," California's 1978 death penalty law does not require any juror to vote for the death penalty unless . . . that juror is convinced that death is the appropriate penalty under all the circumstances.

Bacigalupo II, 6 Cal.4th at 470 (some internal quotation marks and citations omitted).

When a California jury imposes a sentence of death, it does

not specify any sentencing factors upon which it may have relied. Indeed, California juries do not have to unanimously agree on particular aggravating and mitigating circumstances. They must merely all agree that "death is the appropriate penalty under all the circumstances." *Id.*

B. Factual Background And State Court Proceedings

In 1981, Sanders and a confederate bludgeoned Janice Allen to death and nearly killed Dale Boender in the victims' apartment during a robbery. A few days earlier, Sanders had botched a robbery on the same victims. In 1982, a Kern County, California, jury convicted Sanders of murder, attempted murder, robbery, burglary, and attempted robbery for those 1981 crimes. The jury found Sanders eligible for the death penalty at the guilt phase of the trial by finding four special circumstances true: the murder-during-a-burglary special circumstance; the murder-during-a-robbery special circumstance; the witness killing special circumstance; and the especially heinous, atrocious, and cruel murder special circumstance.

During the penalty phase, the state argued that the jury should choose the death penalty for Sanders because it was the proper penalty. The prosecutor mentioned the special circumstances, but only in passing and only as part of the circumstances of the crime, which he did emphasize along with other aggravating factors unrelated to the special circumstances; the special circumstances themselves played at most a minimal role in sentence selection. (JA 99, 142-147.) The jury set the penalty at death, and the judge later imposed the death sentence.

Sanders' conviction and sentence were affirmed on his automatic appeal in *Sanders*, 51 Cal.3d 471. (JA 112.). The California Supreme Court found the burglary-murder and especially heinous-atrocious-cruel special circumstances invalid. The burglary-murder special circumstance was declared invalid because the trial court's instructions impermissibly permitted the jury to find the special circumstance true based on Sanders' intent to commit an assault

when he entered the apartment.[4] The cruel, heinous atrocious special circumstance had previously been found invalid under California constitutional law.

The state high the court relied on this Court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983), and on its own state law "reasonable possibility" error test, which it has ruled is the same as "beyond a reasonable doubt," to find the errors harmless as to the penalty phase. The court quoted the record and illustrated how the prosecutor had stressed the overall circumstances of the crime rather than dwelling on the particular special circumstances found true by the jury. The court held that the jury's consideration of those two invalid special circumstances, as one part of the aggravating and mitigating factors in sentence selection at the penalty phase, was "benign" and that there was "little chance" Sanders was prejudiced by it. (JA 98-100.)[5] This case became final on May 28, 1991, when this Court denied certiorari on direct appeal. *Sanders v. California*, 500 U.S. 948 (1991).

C. Federal Court Proceedings

Sanders filed an amended petition for a writ of habeas corpus in the United States District Court for the Eastern District of California on December 20, 1993.[6] The District Court denied his petition on August 24, 2001. (JA 8.) The Ninth Circuit reversed and remanded the case to the District

4. The underlying burglary conviction was not affected.

5. In its decision, the California Supreme Court relied specifically on its prior cases of *People v. Allen*, 42 Cal.3d 1222 (1986) and *People v. Silva*, 45 Cal.3d 604 (1988), in which the court had cited its "reasonable possibility" rule in assessing the impact of invalid special circumstances on sentence selection in those capital cases.

6. Because Sanders' petition for writ of habeas corpus was filed in 1993, prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996, AEDPA considerations do not apply to this case.

Court with instructions to grant the writ as to the penalty unless the state granted a new penalty trial or imposed a penalty less than death. (JA 30.)

The Ninth Circuit held that California is a "weighing" state for purposes of evaluating the effect of an invalid aggravating factor on the penalty selection, and analyzed the effect of the invalid special circumstances under this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738, 745, 752 (1990). Under *Clemons*, the invalidity of an aggravating factor violates the Constitution unless a state appellate court independently reweighs the aggravating and mitigating factors or finds the error to have been harmless beyond a reasonable doubt. The Ninth Circuit reasoned that "a state death penalty regime [is] a weighing system when the sentencer [is] restricted to a weighing of aggravation against mitigation, and the sentencer [is] prevented from considering evidence in aggravation other than discrete, statutorily-defined factors." (JA 13 (internal quotation marks and citation omitted).) The court found that both elements are present in California's sentencing system. The court acknowledged "that California's system has features that are not present in all weighing states" and that the nature of the system "makes it difficult for an appellate court that later reviews the jury's sentencing system to surmise what weight the jury gave to a particular factor." (JA 14-15). The court nonetheless ruled that "California still qualifies as a weighing state, because the jury's sentencing discretion is not boundless"—the jury "must consider the defined list of aggravating factors and may not consider other aggravating factors in making its penalty determination." (JA 13, 15-16, citing *Boyd*, 38 Cal.3d at 773.)

The Ninth Circuit next held that the California Supreme Court neither independently reweighed the aggravating and mitigating factors nor engaged in a proper harmless-error analysis. As to the latter holding, the court stated that, "[a]lthough the California court did apparently conduct some type of harmless-error analysis, it did not find, as it was required

to do, that the error was harmless beyond a reasonable doubt." (JA 17 (internal quotation marks and citations omitted).) The court based this conclusion on the California Supreme Court's failure to use the words "harmless error" or "reasonable doubt" and on the California Supreme Court's "erroneous" application of the rule for "non-weighing" states.[7] (JA 17-18.) Finally, the Ninth Circuit ruled that the error was substantial and injurious under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

SUMMARY OF ARGUMENT

California is not a "weighing" state. Therefore, the California Supreme Court was not required to determine whether the jury's consideration of the "existence" of an invalid special circumstance was harmless beyond a reasonable doubt as to penalty or to reweigh the remaining sentencing factors. Furthermore, even if California was a "weighing" state, the California Supreme Court's harmless error analysis under state law met Eighth Amendment requirements for curing any error.

In a "weighing" state, the sentencer uses the same aggravating factors to determine eligibility for a death sentence and to select a death sentence. Since these factors are eligibility factors, they are ordinarily propositions with a factual nexus to the crime or the defendant. They do not embrace the circumstances of the case as a whole. The sentencer can only compare those specific aggravating factors with separate mitigating factors to choose the appropriate penalty. No other aggravating evidence may be introduced. On the other hand, in a "non-weighing" state, the sentencer's consideration of aggravating circumstances is not limited to a distinct list of discrete factors and includes all the circumstances of the crime.

California is a "non-weighing" state because sentencers do not use the same list of factors for both determining eligibility

7. The Ninth Circuit did not address the California Supreme Court's reliance on *Allen* and *Silva* or even mention the "reasonable possibility" test.

and aggravation of sentence. Instead, a California jury first determines eligibility from a list of "special circumstances." If a special circumstance is found true, a separate penalty phase is conducted. The jury considers a single list of factors that guide its discretion in considering the circumstances of the offense and the offender. The first factor directs the jury to the circumstances of the crime, including the "existence of any special circumstances." Other factors also direct the sentencer's attention to circumstances of the crime that bear on the culpability of the offender and the seriousness of the crime. With only the minor exclusion of petty misconduct, the prosecution is permitted to introduce aggravating evidence from the defendant's background, including other violent crimes and prior felony convictions.

Unlike a "weighing" statute, California's law permits full consideration of all relevant information about the circumstances of the offense and the offender. Unlike a "weighing" state, aggravation is not parsed into discrete factors.

When an aggravating factor is found invalid in a "weighing" state, then the sentencer has considered a specific factor about the case that should never have informed its decision about the penalty. Since no other aggravation can be presented, these aggravating factors are central to the penalty selection. It is necessary to find that the impact of that invalid aggravator on the penalty decision was harmless beyond a reasonable doubt or to reweigh the remaining aggravation and mitigation.

Under California law, the invalidity of a special circumstance does not preclude a jury from considering the underlying facts of that special circumstance as part of its total consideration of the circumstances of the crime as a whole. Nor does its invalidity actually affect the relative weight the jury gives to those circumstances in determining the appropriate penalty. As long as the evidence is admissible to determine penalty and does not involve any constitutionally protected conduct, there is no error. It is not constitutionally significant

that this evidence may be improperly labeled as a "special circumstance." The concerns and protections necessary to correct the improper impact of invalid aggravating factors in "weighing" states are not implicated in the California capital sentencing scheme as long as the California Supreme Court determines the invalid special circumstance would not have made a difference in the sentence.

Furthermore, even if California is treated as a "weighing" state, the penalty in this case should be affirmed. This is because the California Supreme Court, in its opinion evaluating the impact of the invalid special circumstances on Sanders' sentence, relied on its own state law "reasonable possibility" standard, which is, by California Supreme Court definition, the same as the "beyond a reasonable doubt" standard. Thus, when the California Supreme Court explained why the impact of the invalid special circumstances was "benign," citing that state law error standard, it necessarily determined the error was harmless beyond a reasonable doubt.

Accordingly, the Ninth Circuit was wrong when it held that it could not be determined what standard California had relied on assessing the impact of the error of the jury considering the invalid special circumstances. Should California be treated as a "weighing" state, it has already performed the applicable review in this case, and the penalty should therefore be affirmed.

ARGUMENT

I.

THE CALIFORNIA DEATH PENALTY STATUTE IS NOT A "WEIGHING" STATUTE FOR PURPOSES OF ASSESSING THE IMPACT OF AN INVALID SPECIAL CIRCUMSTANCE ON THE SENTENCE SELECTION PROCESS IN THE PENALTY PHASE

A valid death penalty statute must have two characteristics. First, to avoid random and capricious application and to ensure

a measured, consistent imposition of penalty, a valid statute must include rational criteria to genuinely narrow the group of offenders to whom the penalty may be applied so that a capital murder may be properly distinguished from other murders. This occurs in the process of determining whether an offender is eligible to receive the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). This narrowing or eligibility function can be performed by the legislature's limiting definition of capital offenses, or by jury findings of aggravating factors from a statutory list at either the guilt or penalty phase of a trial. *Lowenfield*, at 246; *Tuilaepa*, 512 U.S. at 971-973.

Once the eligibility decision has been made, the second necessary characteristic comes into play. To ensure that the penalty is imposed in an appropriate, fair, and unbiased way, the selection decision must allow for "individualized sentencing and must be expansive enough to accommodate all relevant mitigating evidence so as to assure an assessment of the defendant's [personal] culpability." *Tuilaepa*, 512 U.S. at 973. The selection decision is made at the penalty trial.

With the eligibility decision, the jury's sentencing discretion is suitably narrowed, while with the selection decision, after the eligibility threshold is crossed, the jury's sentencing discretion is broadened to take into account the "character of the individual and the circumstances of the crime." *Jones v. United States*, 527 U.S. 373, 381 (1999); *Zant v. Stephens*, 462 U.S. at 879.

In the eligibility decision, the jury is usually asked to answer a specific question or make a specific factual finding about the crimes at issue to determine if the offender qualifies for imposition of capital punishment. *Tuilaepa*, 512 U.S. at 973. In contrast, in the selection decision, after the offender has been determined to fall into the narrowed class of eligible offenders, the jury, in a broad inquiry, "is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983); *Jones*, 527 U.S. at 381.

This Court has noted that a variety of capital sentencing schemes could meet these constitutional requirements, and that states are free to formulate their own statutes within these parameters. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984); *Gregg v. Georgia*, 428 U.S. at 195. "[T]here can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" *Zant*, 462 U.S. at 884, quoting *Lockett v. Ohio*, 438 U.S. 586, 695 (1978). Each capital system must be examined and evaluated on an individual basis. *Gregg*, 428 U.S. at 195.

A. To Determine The Impact Of Invalid Aggravating Factors On The Selection Of Sentence, This Court Has Distinguished Capital Sentencing Statutes Based On Whether Such Statutes Are Considered "Weighing" Or "Non-weighing"

1. Unlike "Weighing" States, "Non-Weighing" States Do Not Limit Sentence Selection To The List Of Statutory Aggravating Factors Which Are Also Used For The Eligibility Determination

In examining the federal and the various state capital punishment statutes which have come before it, this Court differentiates between those statutes in which the sentencer "weighs" specified aggravating factors in the selection decision and those statutes where no such weighing is prescribed.

In "weighing" states, the sentencer first finds a defendant eligible for the death penalty by finding true specified statutory aggravating factors. The sentencer is limited to those same aggravating factors in selecting penalty. In a "non-weighing" state, the sentencer is not limited to the specified aggravating factors found true during the eligibility phase. The "primary feature that distinguishes non-weighing systems from weighing systems" is that "statutory aggravating factors play no role in the sentencing process above the role of all other evidence. . ." *Williams v. Cain*, 125 F.3d 269, 283-284 (5th Cir. 1997);

People v. Shaw, 713 N.E.2d 1161, 1182 (Ill. 1998) (during penalty phase in "weighing" state, jury considers only the statutory aggravating factors introduced in the eligibility phase); *Flamer v. State of Delaware*, 68 F.3d 736, 748-749 (3rd Cir. 1995) (jury still considers underlying facts of invalid aggravator).

Georgia is the quintessential "non-weighing" state. In Georgia, an offender's guilt of a crime is determined at the guilt phase of a bifurcated trial. *Gregg*, 428 U.S. at 163. At a separate penalty phase, both the eligibility and selection decisions occur. Before an offender is eligible for a capital penalty, the jury must find true at least one of 10 statutorily listed "aggravating" factors, which must be found true beyond a reasonable doubt and specified in the jury's verdict; this meets the constitutional narrowing requirement. *Gregg*, at 164-165. To arrive at the selection decision, the jury is directed to"consider" any lawful aggravating and mitigating circumstances, including that statutory narrowing aggravator. *Gregg*, at 164-165; GA. Code Ann., §§ 17-10-30 and 17-10-31.

Florida and Mississippi are the most frequently cited "weighing" states.

In Florida, an offender must be found guilty of a capital crime at the guilt phase of a bifurcated trial, while the eligibility and selection decisions occur in two later trial phases. *Sochor v. Florida*, 504 U.S. 527, 529 (1992); Fla. Stat. § 921.141. A jury performs an advisory function to the judge. *Sochor*, at 529. To choose death, the judge must specify at least one aggravating circumstance from the statutory list of eligibility factors, and must specifically find that those aggravating circumstances outweigh any mitigating circumstances. *Sochor*, at 529. Although the federal constitution does not require it, these aggravating factors are "exclusive" and no other aggravating evidence may be considered. *Barclay v. Florida*, 463 U.S. 939, 950, 966-967 (1983); *Williams*, 125 F.3d at 268.

In Mississippi, a jury finds an offender guilty of a capital murder in the guilt phase of a bifurcated trial. The eligibility

and selection functions occur at the second phase of the trial, where, to impose a punishment of death, the jury must make unanimous written findings that: there are aggravating circumstances, selected from amongst a statutorily-enumerated list; and such aggravating circumstances are not outweighed by any mitigating circumstances which may have been found based on a statutorily-enumerated list. *Stringer v. Black*, 503 U.S. 222, 225 (1992); Miss. Code Ann., § 99-19-901. The eligibility and selection decisions are both made during the penalty phase of a Mississippi trial. As in Florida, the only aggravation to be considered is the same aggravating circumstance which makes the offender eligible for capital punishment. *Stringer v. Jackson*, 862 F.2d 1108, 1114 (5th Cir. 1998) rev'd *sub nom* on another point in *Stringer v. Black*, 503 U.S. at 237.

The difference between the capital sentencing systems in Georgia and those in Florida and Mississippi has been the basis for this Court's two different methods of evaluating the impact of an invalid aggravating factor in each state's system. The primary difference is the focus of "weighing" states on statutory aggravating factors for sentence selection. *Williams*, 125 F.3d at 283.

In "non-weighing" Georgia, the aggravating circumstances have no "role in guiding the sentencing body in the exercise of its discretion" because there is no "special weight" to the presence of more than one aggravating circumstance in determining penalty. Thus, the effect of an invalid aggravating circumstance is less constitutionally significant than in so-called "weighing" systems. *Zant*, 462 U.S. at 874, 879, 891.

In "non-weighing" systems, if there are other, valid aggravating circumstances, in addition to the one found invalid, the invalid aggravating factor will not nullify the penalty as long as (1) the reason the circumstance was invalid does not implicate due process, and (2) the evidence underlying the invalid circumstance was "nevertheless fully admissible." *Zant*, at 885-886. The invalid factor does not unduly affect the selection process or make the penalty selection arbitrary or

capricious. *Tuggle v. Netherland*, 516 U.S. 10 (1995).

In "weighing" states such as Florida and Mississippi, on the other hand, an invalid aggravating circumstance can "skew" the weighing process so a different approach is necessary. *Jones v. United States*, 527 U.S. 373, 398 (1999). If an aggravating factor is vague, then its application will vary from case to case. This introduces an unacceptable possibility of randomness between defendants and cases in the selection of sentence. *Flamer*, 68 F.3d at 749. Furthermore, if the factor is invalid, then the sentencer is considering an "illusory" circumstance because the jury should not be considering this factor or its underlying evidence at all. *Stringer*, 503 U.S. at 235.

The statutory aggravating circumstance in a "weighing" state has a key role in sentence selection because it is the only factor militating in favor of the more severe penalty. When a jury has weighed an invalid aggravating circumstance, the state appellate court can only cure the error and uphold imposition of the death penalty by either reweighing the aggravating and mitigating evidence absent the invalid aggravating circumstance, or by engaging in constitutional harmless error review. *Clemons*, 494 U.S. at 741 and 754. Whether the sentence is to be vacated depends on the function of the aggravating circumstances and the reason why the aggravating circumstance was invalidated. *Barclay v. Florida*, 463 U.S. 939, 951 (1983); *Zant*, 462 U.S. at 864.

In sum, the "weighing" state rule should apply only to states where the aggravation to be weighed is restricted to those factors used to establish eligibility. Moreover, in this case, the Ninth Circuit erroneously characterized California as a "weighing" state, and thereby improperly reversed the death penalty imposed by a California jury.

2. Unlike "Weighing" States, California Does Not Limit The Sentencer To The Eligibility Factors As The Sole Aggravating Factors In Sentencing Selection And Otherwise Minimizes The Significance Of Particular Special Circumstances In The Penalty Phase

As noted above, for any state's capital sentencing statute to meet the Eighth Amendment goal of clear and objective standards, there must be at least one eligibility factor found true which genuinely narrows the class of murderers to whom the death penalty applies. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Lowenfield*, 484 U.S. at 244, 246.

In most "weighing" states, the statutory aggravating factor, found true at the sentencing hearing, is that required eligibility factor. However, in most "weighing" states, that same statutory factor additionally operates as the exclusive factor in aggravation for the sentence selection. Thus, for example, in the "weighing" states of Florida and Mississippi, the applicable statutory aggravating factor functions as eligibility factor, and also as the sole aggravation to be weighed against any mitigating factors found at the sentencing. *Sochor*, 504 U.S. at 529-530; *Stringer*, 503 U.S. at 229.

The rationale underlying *Stringer* and *Clemons* properly applies in those states because if an aggravating factor is invalid, then the jury's sentence selection may well have been influenced or altered by this improper factor.

In sharp contrast, in California, the special circumstance(s) found true by the jury at the guilt phase are aggravating factors at sentencing,[8] but they are only one of many sentencing factors

8. As argued above, the inclusion of the phrase "special circumstances" in the sentencing factor (a) in California Penal Code section 190.3 does not mean that special circumstances are independent sentencing factors. Special circumstances are merely subsumed into the circumstances-of-the-crime umbrella set out in factor (a).

for the jury to consider. With the exception of that one subordinate clause reference to special circumstances in factor (a), none of the sentencing factors in California Penal Code section 190.3 is the same as the special circumstances in California Penal Code section 190.2. Under California law, the special circumstances found true are "simply part of the mix of aggravating and mitigating evidence that the jury [can] consider as a whole in determining" penalty. See *Williams*, 125 F.3d at 283. Accordingly, when the "especially heinous, atrocious, and cruel" and burglary-murder special circumstances were declared invalid in this case, no "thumb had been removed from death's side of the scale" because the jury could still consider the evidence underlying those factors. *Stringer*, 503 U.S. at 232; *Williams*, 125 F.3d at 284; *Coleman v. Ryan*, 196 F.3d at 798 (7th Cir. 1999) (jury properly considered the way the victim was killed even if the manner of death could not come before the jury as a statutory aggravating factor); *Hampton v. Page*, 103 F.3d 1338, 1343-1345 (7th Cir. 1997) (sentencer still free to consider burglary even if it was not sufficient as an aggravating factor).

None of the sentencing factors listed in California Penal Code section 190.3 are delineated as either aggravating or mitigating, leaving it up to the jury to determine if each factor is present and whether it tends to aggravate or mitigate the sentence. Cal. Pen. Code, § 190.3; JA 140-141; *People v. Anderson*, 25 Cal.4th 543, 601 (2001). This contrasts with other states where the sentencing factors are labeled, and it matters because the impact on sentencing of an invalid aggravating factor is lessened if it is not so labeled.

Furthermore, California's sentencing factors are not propositional, i.e., they do not require a specific answer, nor can many be answered in a yes or no manner. This matters because propositional factors are more susceptible to improper conclusions or weighing than factors which merely direct the jurors' attention to a category of circumstances. *Tuilaepa*, 512 U.S. at 974.

The fact that, in California, unlike other states, the eligibility decision occurs at the guilt phase, rather than during the penalty phase, also diminishes any chance the jury would consider an invalid eligibility factor in selecting the penalty. The "inherent tension" which this Court has noted exists between a factor's dual role in eligibility and selection decisions, which can make error more likely when the two decisions are made at the same trial phase and in the same deliberation, is considerably lessened when, as in California, the eligibility and selection decisions do not occur together. *Tuilaepa*, 512 U.S. at 973.

Furthermore, the procedural differences between California's sentence selection procedures and those in other states show that California's penalty trials are dispositively less susceptible to the capital sentencing error which occurs in "weighing" states.

There is no "special weight" whatsoever on the special circumstances in determining penalty. *Zant*, 462 U.S. at 873, 891. The particular special circumstances found to be true as eligibility factors are not mentioned in the statute or the jury instructions. Factor (a) encompasses much more than just the special circumstances; its gist is to point out that the jury should consider the facts of the crimes at issue. The special circumstances' effect on sentence selection, if any, is therefore entirely diluted as compared to the "weighing" states, where the aggravating factor used for eligibility and selection purposes is the only aggravation. It would be simply inaccurate to isolate the special circumstances, in the sentencing context, and elevate them to a pivotal role in sentencing selection. The generalized reference to the "existence of special circumstances" in factor (a) is consistent with other listed factors which also guide the jury's consideration of the circumstances of the crime as a whole.

California's system is like Georgia's because the special circumstance is but one of many factors, and it has no special role in sentencing. Unlike "weighing" states, where aggravating

factors are strictly limited, California and Georgia juries are instructed to consider all the facts and circumstances of the crime.

It is significant that Georgia's statutory language, which has consistently been interpreted as giving the jury unfettered discretion to select a penalty, and consistently characterized as referring the jury to the circumstances of the crime, contains the same phraseology as California's factor (a). The Georgia statute directs the jury to consider, in selecting penalty, "any mitigating circumstances or aggravating circumstances otherwise authorized by law and *any of the following statutory aggravating circumstances which may be supported by the evidence*." GA. Code Ann., § 17-10-30, subd. (b), emphasis added. The jury in Georgia considers all circumstances from all phases of the trial and "all the facts and circumstances of the case. . ." *Zant*, 462 U.S. at 872. This language, of course, is exactly parallel to the California sentencing factor (a) language directing the jury's attention to "any special circumstances found to be true." Cal. Pen. Code, § 190.3; JA 140.

The language in the California statute should not have the effect of converting California into a "weighing" state. Rather, if it means circumstances of the crime in Georgia, it should mean the same thing in California.

Therefore, it should be insignificant that evidence of the circumstances of the crime is considered by the jury at the penalty phase under the invalid rubric of a special circumstance. "[A]ny possible impact" from that label "could not fairly be regarded as a constitutional defect in the sentencing process." *Zant*, 462 U.S. at 889; *Flamer*, 68 F.3d at 753. Nothing about the California statute or instructions to the jury gives "special circumstances" any "special weight" in the sentence selection. Rather, they are covered by the overarching "circumstances of the crime" and the other factors that highlight relevant considerations about the offense and the offender. If a particular special circumstance is declared invalid, the evidence underlying that special circumstance is saved by the jury's

proper consideration of the "circumstances of the crime."

3. Since California Is A "Non-Weighing" State, Sanders Was Not Prejudiced By The Two Invalid Special Circumstances In His Case

The invalidation of two of the special circumstances in this case did not affect the jury's selection of the death sentence. The prosecution's reliance on the "especially heinous, atrocious, and cruel" special circumstance did not lead to the introduction of any evidence that was not otherwise admissible at the guilt or penalty phases of Sanders' trial. The evidence underlying that special circumstance was properly considered as part of the circumstances of the crime. *Clemons,* 494 U.S. at 754, fn. 5; *People v. Superior Court (Engert)*, 31 Cal.3d 797, 805-806, n.7 (1982). Similarly, the evidence of Sanders' burglary was properly admitted as evidence of the circumstances of his crime even if it was not properly considered as a burglary-murder special circumstance. These were special circumstances "invalidated by the Supreme Court on grounds of vagueness, whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged." *Zant*, 462 U.S. at 887.

Under the United States Constitution and California law, there is no infirmity in instructing the jury during the selection phase to consider the circumstances of the crime including the existence of special circumstances found true even if some of those special circumstances are invalid. For instance, in this case, nothing in the United States Constitution prohibits a court from instruction a jury to consider the "heinous, atrocious, and cruel" *nature* of the murders and that burglary that Sanders committed in conjunction with the crimes, even if neither of those factors by themselves would make Sanders *eligible* for imposition of the death sentence. *Zant*, 462 U.S. at 888; *Coleman*, 196 F.3d at 799.

B. The Ninth Circuit's Characterization Of California As A "Weighing" State In This Case Was Flawed

In this case, the Ninth Circuit held that California was a "weighing" state because a California death penalty jury is (1) restricted to weighing aggravation and mitigating in selecting the penalty, and (2) since the only aggravation is discrete, statutorily-defined factors, the jury does not have boundless discretion, as is required in a "non-weighing" state. *Sanders*, 373 F.3d at 1060-1061; JA 13-15. This conclusion is simplistic, erroneous, and based on false premises about the California death penalty statute.

1. The California Statute Does Not Limit The Evidence In Aggravation Of Sentence

The factors being weighed as part of the penalty determination are not the same type as those weighed in "weighing" states. The sentencing factors listed in the California statute are not the eligibility, or statutory aggravating, factors at the root of "weighing" states' penalty decisions. Cal. Pen. Code, §§ 190.2 and 190.3; Miss. Code Ann., § 00-19-101. The "weighing" states' aggravating factors are the identical propositional, specific, factual items used to narrow the class of offenders eligible for capital punishment. This contrasts with California's list of sentencing factors describing aspects of the offender and the crime which are recommended to the jury for weighing as part of the jury's decision.

While the sentencing factors are listed in California's sentencing statute, they certainly are not the discrete or finite factors which define a "weighing" state. None of these sentencing factors is labeled either aggravating or mitigating. They are not propositional factors. They are broad and inclusive, especially factor (a), which, like Georgia's sentencing directive, prescribes consideration of the facts and circumstances of the crime. Stated another way, while there is

a statutory list of sentencing factors, it is not a limiting list, but an "open-ended" expansive one, phrased to include virtually everything about the crime and the offender for the jury's consideration and evaluation.

In this case, the Ninth Circuit looked at the California law, but overlooked or disregarded a basic provision of the statute.[9/] The Ninth Circuit held California is a "weighing" state because, since the jury can only consider as aggravation the "defined list of aggravating factors [in Penal Code section 190.3], the jury's discretion is not boundless." *Sanders*, 373 F.3d at 1062; JA 15. In so holding, the Ninth Circuit did not take into account the nature and substance of the list of sentencing factors in Penal Code section 190.3, namely, that the list is not merely aggravating, it is not limited to eligibility factors, and, particularly in factor (a), by directing the jury to the facts and circumstances of the offenses, it is so broad as to confer wide jury discretion to select the appropriate penalty. The Ninth Circuit's false premise in its syllogistic reasoning defeats its conclusion that California is a "weighing" state.

It is true that the prosecution is limited as to the evidence it may introduce in the penalty phase. The California Supreme Court has interpreted the statute as precluding aggravating evidence unless it relates to the circumstances of the crime, the murderer's prior felonies, or the murderer's other violent criminal acts. The only actual boundary to the jury's discretion is that the prosecution cannot introduce, in its case-in-chief at the penalty phase, evidence of the defendant's prior misdemeanors, unadjudicated non-violent felonies and petty or trivial misconduct. This *de minimis* limitation of evidence of

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9. The Ninth Circuit dismissed California's reliance on *Zant* rather than on *Clemons*, suggesting that perhaps the state court was unaware of *Clemons* since it was a relatively recent decision when California decided this case. *Sanders*, 373 F.3d at 1063; JA 16-17. However, this ignores and demeans California's consistent reliance on the *Zant* standard as the proper standard to apply to its law, both before and after *Sanders*. See *Allen*, 42 Cal.3d at 1281; *Bacigalupo II*, 6 Cal.4th at 474.

the murderer's background has nothing to do with special circumstances that are properly considered as part of the circumstances of the offense, and it does not materially distinguish California's law from the wide-open discretion available to juries in "non-weighing" states. *Boyd*, 38 Cal.3d at 774.

In short, California is not a "weighing" state because the nature and substance of its capital penalty selection, along with its state Supreme Court assessment of its statute, significantly distinguish it from "weighing" states.

2. The Term "Outweighs" In The California Law Does Not Mean California Is A "Weighing" State

The mere presence of the word "outweighs" in the California statute does not mean that California is a "weighing" state. *Coleman*, 196 F.3d at 798; *Williams v. Calderon*, 52 F.3d 1465, 1477 (9th Cir. 1995); *Flamer*, 68 F.3d at 749; cf. *Richmond v. Lewis*, 506 U.S. 40 (1992). The California Supreme Court has explained that "the word 'weighing' is a metaphor for a process which by nature is incapable of precise definition." *People v. Brown*, 40 Cal.3d 512, 541 (1985). It is a deliberative, normative process, in which the jury makes a moral assessment, rather than a mechanical finding or counting of facts or circumstances. *People v. Musselwhite*, 17 Cal.4th 1216, 1267 (1998); *Bacigalupo II*, 6 Cal.4th at 468-470, 476.

As the statute makes clear, the jury is to "consider, take into account, and be guided by" the sentencing factors in selecting the appropriate penalty. Cal. Pen. Code, § 190.3. There is little denotive or connotative difference between "weigh," "consider," and "balance." Recourse to a basic dictionary shows this conceptual overlap. Indeed, the California Supreme Court held that this language is "essentially equivalent." *People v. Frierson*, 25 Cal.3d 142, 180 (1979); *see also People v. Jackson*, 28 Cal.3d 264, 315 (1980); *Harris v. Pulley*, 692 F.2d at 1195 overruled on another point in *Pulley v. Harris*, 465 U.S. at 37.

"Weigh" means "to consider and choose carefully," "to balance or ponder in one's mind," or "to consider in order to make a choice." Webster's New World Dictionary, Second College Edition, 1980, p. 1612. "Consider" means "to look at carefully; examine," or "to think about in order to decide; ponder," or "to keep in mind; take into account." *Id.*, at 303. Similarly, "balance" means "the power or ability to decide." *Id.*, at 105.

Distinguishing between these concepts would be an elusive goal. In California, no attempt is made to do so, for the penalty selection process encompasses all of these mental processes. *Bacigalupo II*, 6 Cal.4th at 468-470.

"Weighing," "considering," and "balancing" are so close in meaning as to be synonymous. The reality is that "weighing" plays a role in all states' sentencing determinations. For example, in the "non-weighing" state of Georgia, while the jury is statutorily described as "considering" aggravation and mitigation in selecting a penalty, that term is used interchangeably with the term "weighing" in describing a Georgia jury's deliberative process, even in this Court's jurisprudence. *Zant*, 462 U.S. at 880. Indeed, in *Gregg* itself, this Court collectively described the selection process of the capital statutes of a number of states, including Florida and Georgia, as weighing factors. *Gregg*, 428 U.S. at 180, and 193-195; *McCleskey v. Kemp*, 481 U.S. 279, 314-315, n.37 (1987) (referring generically to jury discretion to "evaluate and weigh" sentencing factors.)

Because these concepts are so similar and do overlap, a state's use of the word "weigh" should not be the touchstone for the categorizing of its capital sentence law as "weighing" or "non-weighing." This is especially true in California, where it is clear the penalty selection process includes much more than mere mechanical, literal weighing of statutory aggravating factors.

3. The Ninth Circuit Ignored The Fact That California Does Not View Itself As A "Weighing" State

The California Supreme Court has repeatedly concluded California is not a "weighing" state. As this Court has made clear, how a state evaluates and defines its own death penalty law is dispositive because each state is the final arbiter of its law. *Profitt v. Florida*, 428 U.S. 242, 255 (1976); *Gregg*, 428 U.S. at 202; *Stringer*, 503 U.S. at 235. "It would be a strange rule of federalism that ignores the view of the highest court of the state as to the meaning of its own law." *Id.*

First, in cases assessing the impact of invalid special circumstances on California's penalty selection process, the California Supreme Court has always relied on the "non-weighing" state rules set out by this Court in *Zant*, just as it did in this case. *People v. Beardslee*, 53 Cal.3d 68, 95-96 (1991); *People v. Pensinger*, 52 Cal.3d 1210, 1271 (1991); *Sanders*, 52 Cal.3d at 520-521; *People v. Adcox*, 47 Cal.3d 207, 252 (1988); *Silva*, 45 Cal.3d at 632; *People v. Wade*, 44 Cal.3d 975, 998 (1988); *Allen*, 42 Cal.3d at 1281.

Second, when this Court specifically directed the California Supreme Court to consider the effect of an invalid special circumstance in light of the "weighing" state case of *Stringer*, the California Supreme Court's subsequent decision clearly distinguished the California death penalty law from that of the "weighing" state of Mississippi, which had been addressed in *Stringer*. *Bacigalupo II*, 6 Cal.4th 457.[10/]

The California court held that while California juries are directed to "weigh" sentencing factors, those sentencing factors

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10. This Court granted certiorari in *People v. Bacigalupo*, 1 Cal.4th 103 (1991) (*Bacigalupo I*). After *Stringer* was decided in 1992, this Court vacated certiorari and remanded the case for consideration in light of *Stringer* (*Bacigalupo v. California*, 506 U.S. 802 (1992)), which resulted in the decision in *Bacigalupo II*.

are not subject to Eighth Amendment vagueness analysis because the sentencing factors do not perform a narrowing function as part of the penalty selection process. *Bacigalupo II*, 6 Cal.4th at 477. Since all of the California sentencing factors are for sentence selection, and since California's sentence selection process is a normative one, wherein the jury assesses moral culpability, it is unnecessary to subject sentencing factors to Eighth Amendment standards. *Bacigalupo II*, at 475-477. To the extent that special circumstances, which must perform a narrowing function at the guilt phase, are mentioned in sentencing factor (a), they have completed their narrowing function and are subsumed into the circumstances of the crime at the penalty selection phase. *Bacigalupo II*, at 469-470, 477.[11/]

In interpreting and assessing its own law, California has explicitly held that the mere mention of "special circumstances" in the statute as an aspect of the sentencing factor (a) has no particular substantive or legal significance.

In *Bacigalupo II*, the California Supreme Court, in rejecting Bacigalupo's claim that sentencing factor (a) was impermissibly vague, summarized the factor as "the circumstances of the crime" and accorded no significance to the mention of special circumstances. *Bacigalupo II*, 6 Cal.4th at 679.

In *Silva* the California Supreme Court stated that the mention of "special circumstances" as a part of factor (a) in the prosecutor's argument drew the jury's attention to the "facts behind those findings" rather than to the fact the jury had found the special circumstances true in the guilt phase. *Silva*, 45 CAL.3d at 634. The California Supreme Court has also noted "the jury is not apt to give undue weight to the fact underlying the present offenses merely because those facts also give rise to a special circumstance. [Citations.]" *People v. Medina*, 11

11. This Court denied certiorari in *Bacigalupo II*. *Bacigalupo v. California*, 512 U.S. 1253 (1994).

Cal.4th 694, 779 (1995).[12/]

This Court, in rejecting a similar vagueness challenge to the California sentencing factor (a) in *Tuilaepa*, also characterized the factor as the "circumstances of the crime," noting that such circumstances are "a traditional subject for consideration by the sentencer" which "should" be considered, and concluding that, with factor (a), California has instructed the jury "to consider a relevant subject matter. . . in understandable terms." *Tuilaepa*, 512 U.S. at 976. The *Tuilaepa* language was subsequently quoted by the California Supreme Court in denying yet another challenge to factor (a). *People v. Jenkins*, 22 Cal.4th 900, 1051 (2000).[13/]

The reason the special circumstances are mentioned in factor (a) is to ensure the jury considers both the facts of the crimes and the facts underlying the special circumstances. As the California Supreme Court noted in rebuffing a claim the special circumstance language should be omitted from the jury instructions, "the manifest purpose of factor (a) [is] to inform jurors that they should consider, as one factor, the totality of the circumstances involved in the criminal episode that is on trial." *People v. Cain*, 10 Cal.4th 1, 68 (1995), quoting *People v. Morris*, 53 Cal.3d 152, 224 (1991). The California Supreme Court's dispositive and correct conclusion that special circumstances are not critical in sentence selection was not accorded proper significance by the Ninth Circuit. *Stringer*, 503 U.S. at 234, 237.

12. As the California death penalty law makes clear, "evidence presented at any prior phase of the trial . . . shall be considered on any subsequent phase of the trial" in a capital case. Cal. Pen. Code, § 190.4, subd. (d).

13. On the other hand, a "special circumstance" based simply on the "circumstances of the crime" would be insufficient for determining eligibility for the death penalty. *See Maynard v. Cartwright*, 486 U.S. 356, 360-361 (1988).

II.

THE CALIFORNIA SUPREME COURT'S HARMLESS ERROR REVIEW REFERRED TO ITS STATE "REASONABLE POSSIBILITY" TEST, WHICH IS THE EQUIVALENT OF "HARMLESS ERROR" AND "BEYOND A REASONABLE DOUBT"

In assessing the impact of the invalid special circumstances, found true in the guilt phase of the trial for eligibility purposes, on the sentencing factors and the validity of penalty selection, in the penalty phase, the California Supreme Court concluded in this case that the jurors would not have been "swayed by abstract concepts" of the special circumstances, noting there was "little chance" of any adverse effect from the invalid special circumstances, and citing California precedents. *Sanders*, 51 Cal.3d at 521; JA 99.

The Ninth Circuit faulted this harmless error analysis, concluding that it had "substantial uncertainty" California had found the error harmless beyond a reasonable doubt absent the use of the words "harmless error" or "reasonable doubt." *Sanders*, 373 F.3d at 1063; JA 19.

This Court has held that, in a "weighing" state, a death penalty imposed based on an invalid aggravating factor can nonetheless be affirmed if the error in considering the invalid aggravation is found harmless beyond a reasonable doubt.[14/] *Sochor*, 504 U.S. at 532. However, contrary to the Ninth Circuit's holding, that standard need not be explicitly stated on the record.

Assuming California is a "weighing" state, so that application of a harmless error test was necessary to rectify the error of an invalid special circumstance factoring in the penalty

14. The penalty can also be affirmed if the appellate court reweighs the aggravation and mitigation absent the offending factor, although that method of curing the error does not factor into this case. *Sochor*, 504 U.S. at 532.

selection, the record shows the California Supreme Court did apply the correct harmless-error standard.

First, no specific, ritualistic language need be included in the state court's harmless-error analysis. State courts need not "adopt 'a particular formulaic indication' before their review for harmless error will pass scrutiny." *Jones*, 527 U.S. at 404, citing *Sochor*, 504 U.S. at 540; *Hampton v. Page*, 103 F.3d at 1344. Thus, the California Supreme Court was not required to state the specific harmless-beyond-a-reasonable-doubt language in its decision.

Second, despite the Ninth Circuit's suggestion to the contrary, it is clear the California Supreme Court did apply the proper error standard and analysis in this case. In its opinion in this case finding the impact of the invalid special circumstances harmless, the California Supreme Court explicitly cited two California cases, *Allen*, 42 Cal.3d 1222, and *Silva*, 45 Cal.3d 604. *Sanders*, 51 Cal.3d at 521, JA 98-99.

Both *Allen* and *Silva* were cases evaluating the impact of one or more invalid special circumstances on the sentence selection process. These cases found that whether the impact of an invalid special circumstance on the jury's penalty selection decision was "substantial error," necessitating reversal of the penalty, "requires 'a careful consideration whether there is any reasonable possibility that [the] error affected the verdict.' [Citations omitted, brackets in original]." *Allen*, 42 Cal.3d at 1281; *Silva*, 45 Cal.3d at 632.

The "reasonable possibility" standard applied by the California Supreme Court in *Allen*, in *Silva*, and in this case is the same beyond-a-reasonable-doubt standard which this Court has indicated should be applied in this situation. "Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24." *People v. Jones*, 29 Cal.4th 1229, 1264, n.11 (2003); *People v. Ashmus*, 54 Cal.3d 932, 965 (1991); *People v. Coffey*, 67 Cal.2d 204, 219 (1967) (equating "reasonable possibility" with "harmless-

beyond-a-reasonable-doubt" test for harmless error).

Accordingly, if California is a "weighing" state, so that harmless error review was necessary to assess the impact of the invalid special circumstances on penalty selection, that review was properly performed in this case by the California Supreme Court when it reviewed the issue and found the impact of the invalid special circumstances "benign." *Sanders*, 51 Cal.3d at 521; JA 99. No talismanic incantation was required.

The court's conclusion that the error was benign is correct, given the following reasons, extant in the record and cited by the California Supreme Court. The prosecutor did not rely on the special circumstances in his closing argument, except as they constituted circumstances of the capital crimes, nor did he urge the jury to rely on the number of special circumstances in the case; he argued that death was the proper and appropriate penalty because of the circumstances of the crimes and Sanders' prior offenses. *Sanders*, 51 Cal.3d at 521; JA 99, 142-147. The evidence constituting these special circumstances was completely and properly admissible. It was also unlikely the invalid special circumstances had any significant impact on the penalty selection, given the complete dearth of mitigating evidence and argument resulting from Sanders' adamant personal choice that none be presented.

For all these reasons, it is clear that California did review this case according to the proper harmless-error standard, and that the error of the invalid special circumstances being included as part of one sentencing factor was harmless beyond a reasonable doubt. As a result, Sanders did receive the discretionary, individualized sentencing consideration to which he was entitled under the Eighth Amendment.[15/] *Clemons*, 494

15. For all these same reasons, the State submits that the Ninth Circuit also erred in concluding, as a matter of federal collateral review, that the invalid special circumstances had a "substantial and injurious effect" on the outcome of the case. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

The Ninth Circuit relied on misperceptions of the penalty selection process in California, and on the role of aggravating circumstances in "weighing" states rather than on the role of special circumstances and sentencing factors in California, as well as on incorrect conclusions about the facts in the case. An accurate *Brecht* analysis using the actual provisions of California death penalty law and the actual facts of this case would have resulted in an affirmance of the sentence.

U.S. at 748; *Jones*, 527 U.S. at 402-404.

Moreover, even if special circumstances were sentence selection factors, there was no error because it does not matter, for sentence selection purposes, whether they were invalid as eligibility factors.

Once eligibility is determined, the factors used for sentence selection should be broad and inclusive rather than specific or narrow. *Stringer*, 503 U.S. at 229; *Ramos*, 463 U.S. at 1008. To be valid, sentence selection factors need only be sufficiently defined so the jury can understand their meaning, and broad enough to allow the jury to consider all relevant mitigating evidence about the offender. *Jones*, 527 U.S. at 400; *Tuilaepa*, 512 U.S. at 972-973; *Bacigalupo II*, 6 Cal.4th at 477. In this case, the burglary and heinous-atrocious-cruel special circumstances were not invalid because they contained any erroneous, inadmissible, or misleading information. *Barclay*, 463 U.S. at 968. Therefore, to the extent special circumstances had any role as a sentencing factor in this case, the jury properly considered them as sentence selection factors, for which purpose they were perfectly valid notwithstanding their invalidity as eligibility factors.

If, as the State asserts, California is not a "weighing" state, this Court should affirm the penalty in this case because there were other, valid eligibility factors remaining, and there was no protected conduct or inadmissible or inaccurate evidence involved in the two special circumstances later found invalid. *Stringer*, 503 U.S. at 229; *Zant*, 463 U.S. at 885-888.

Finally, if California is a "weighing" state, this Court should affirm the penalty in this case because the California Supreme Court's review corrected any infirmity in the penalty

by finding the impact of the invalid special circumstances on the penalty selection process to have been harmless beyond a reasonable doubt. *Sochor*, 504 U.S. at 532.[16/]

16. Even if this Court should determine that California is a "weighing" state and the California Supreme Court's harmless error review was inadequate, the proper remedy is not to reverse the penalty but to remand the case for proper state court review. Although this case is before this Court on federal habeas collateral review rather than direct appeal, remand to the Court of Appeals and thence to the state court is proper. *Richmond v. Lewis*, 506 U.S. 40, 52 (1992); *Parker v. Dugger*, 498 U.S. 308, 323 (1991).

CONCLUSION

For the foregoing reasons, the State of California respectfully submits that the judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: June 2, 2005

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Supreme Court of the United States

JILL L. BROWN, Warden,

Petitioner,

v.

RONALD L. SANDERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Is the California death penalty statute a "weighing statute," meaning the state court is required to determine that the presence of an invalid special circumstance, as part of one factor in the sentencing phase, was harmless beyond a reasonable doubt as to the jury's determination of the penalty?

2. If the first question is answered affirmatively, was it necessary for the state Supreme Court to specifically use the terms "harmless error" or "reasonable doubt" in determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection?

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STATEMENT OF THE CASE

The Crime and The Trials. On Friday, January 23, 1981, Dale Boender and Janice Allen were attacked during a robbery at Boender's apartment in Bakersfield, California. Boender was wounded and Allen killed. At the time, Boender was a drug dealer. Allen, Boender's girlfriend, was an intravenous drug user. Boender supplied Allen with drugs, and at times Allen accompanied Boender on his drug sales. RT 163, 643, 650.

The State charged respondent Ronald Sanders and John Cebreros with murder and attempted murder. JA 50.[1] The State's case against Sanders rested largely on the testimony of Boender and Brenda Maxwell, who was Boender's biggest cocaine customer. RT 735. Their testimony failed to persuade the first jury to hear the case that either defendant was guilty. The jury could not agree on a verdict. JA 7.

The sources of doubt about Sanders' guilt are apparent from the record. Maxwell was an immunized accomplice, who originally was arrested for Allen's murder and who implicated Sanders under police pressure. RT 160-62, 198, 205. She was a heavy intravenous cocaine user who sold drugs for Boender, her only supplier, who had recently cut her off. RT 162-64, 733. Maxwell hid from the police and testified at the preliminary hearing only when a warrant for her arrest was issued. RT 160-61. She lied at the preliminary hearing, despite a grant of immunity. RT 204. At trial, Maxwell stated that "I told so many lies" and admitted that she would lie "[i]f I thought it would clear me." RT 200-01. After trial, the State conceded about

---

[1] Petitioner, the former warden of the prison where respondent is confined, is referred to as "the State." Respondent is referred to by his surname. Citations to the record are as follow: "JA" refers to the Joint Appendix and "RT" refers to the trial court Reporter's Transcript.

Maxwell that "truthfulness was not her long suit," JA 159, and the state supreme court found that "Maxwell was admittedly not the most veracious witness." JA 78.

Nevertheless, Maxwell was a star witness for the State. Maxwell told the jury that she and her aunt, Donna Thompson, along with Sanders, planned to rob Boender on Wednesday, January 21, 1981, two days before the fatal attack on January 23. According to Maxwell, she was to lure Boender to her home with the false promise of a large drug sale and Sanders was to bind both Boender and Maxwell with duct tape, thus making Maxwell look innocent of the setup. JA 5, 50-51. The plan went awry. Allen showed up with Boender at Maxwell's home, and after a brief struggle between Boender and Sanders, Boender and Allen fled with the drugs. JA 5, 51. Maxwell testified that Sanders was worried that Boender could identify him. JA 6, 51. Sanders spoke with John Cebreros who agreed to help. JA 6, 51.[2]

On Friday, January 23, Boender and Allen were alone preparing dinner at Boender's apartment. There was a knock at the door, and Boender opened it. JA 6, 52. According to Boender, Sanders, holding a gun, and Cebreros stood outside. JA 6, 52. Boender saw the men for approximately five to seven seconds as they entered the apartment. JA 52; RT 780-81.

Boender testified that Sanders, the shorter of the two men, grabbed him, spun him around and pushed him to

[2] Maxwell also supplied police with a roll of duct tape that had Maxwell's and Sanders' fingerprints, among others, on it. JA 53; RT 383-90. Several witnesses presented an innocent explanation for Sanders' fingerprints on the duct tape. JA 54. On the afternoon of January 24, Sanders and some relatives moved a stove from Thompson's house when Thompson apparently was not home. RT 1435-61. Sanders used gray duct tape found at the house to shut the oven's broken door. RT 1438-39, 1454-55.

the floor, face down, JA 6, 52; RT 910, although Boender previously had told police that the larger man, Cebreros, did this. RT 911. When Allen emerged from the kitchen, she was made to lie on the floor next to Boender. JA 6, 52. Boender and Allen were bound and blindfolded. JA 6, 52.

Boender felt someone remove his money and his wallet. JA 52. He heard rummaging and banging inside the apartment, and he was dragged into another room by one person, who then left the room. JA 6, 52. Boender heard one man say he wanted to leave the apartment and the other say he wanted to stay. JA 6, 52. Boender did not know which of the two men said he wanted to go. JA 6; RT 791. Boender heard footsteps approach and felt a blow to his head. JA 6, 52. He recalled nothing further until Sunday, January 25. JA 6, 52; RT 692-93.

Early on Saturday, January 24, Boender's roommates discovered Boender lying in blood on his bed and Allen's body in another bedroom. JA 6-7, 52. Allen died from a blow to the head that fractured her skull and lacerated her brain. JA 7, 53. Boender also suffered a skull fracture. JA 7, 53.

At trial, Boender unequivocally identified Sanders as the man who tried to rob him on Wednesday, January 21, and identified both Sanders and Cebreros as his assailants on Friday, January 23. RT 656, 676, 957, 959.

Tried together, Sanders and Cebreros argued that Boender's identifications were mistaken for several reasons. Boender observed his assailants on both Wednesday and Friday for a short time under violent circumstances. RT 675-79, 779-81. On Friday, he had been smoking marijuana and drinking wine, RT 598-99, 871-72, and he had been given narcotic pain medication for the injuries he sustained on Wednesday. RT 749, 1418-22. Suffering amnesia from his head injuries, Boender had no memory at all of the two days before or the day after the murder, no recollection of the unrecorded police interview in which

he described his assailants, and only a hazy memory of the three weeks following the attack. RT 692-93, 764-74, 779-81, 919. Boender also gave contradictory statements about the identity of the Friday intruders. At trial, Boender insisted that Sanders and Cebreros were the assailants, RT 676-77, but at the crime scene, Boender told police and emergency personnel that he did not know, and had never before seen, his assailants. RT 1133, 1151-53.

Moreover, three witnesses testified that Sanders and Cebreros spent the night of the murder at the home of Cebreros' brother, talking, playing chess and drinking beer. JA 7, 53; RT 1240-46, 1253-58, 1264-71. The defense also emphasized that none of the physical evidence at the murder scene was connected to either Sanders or Cebreros, while some key evidence – a hair found tied within the cord knot binding Allen's wrists and a fingerprint on the handle of the vacuum cleaner from which the cord had been cut – remained unidentified. RT 365-66, 1191, 1198-1203, 1213-14.

Finally, the defense established that other people had a motive and might have robbed and attacked Boender and Allen. Donna Thompson, who frequently purchased drugs from Boender and was angry at him for having "shorted" her on a cocaine buy, apparently knew that Allen had been killed before the news was public, and told Maxwell that Allen "was not supposed to be dead" and "that wasn't what was planned." JA 23; RT 1005; RT 145. After being questioned by police, Thompson disappeared. RT 205, 998-99. In addition, Allen's grandmother agreed to testify for the defense. Allen told her grandmother a different version of the attempted robbery on Wednesday, January 21. Allen said three men had beaten her and Boender and had tried to steal her pocketbook in a parking lot because of a debt Boender owed. RT 1227-32. Finally, around the time of the Friday crimes, Boender's neighbors saw two men outside of Boender's apartment who looked

somewhat like, but were not, Sanders and Cebreros. JA 53; RT 1296-97, 1302, 1313-15, 1321-26, 1337-42.

The second jury convicted both Sanders and Cebreros of first degree murder. The jury also found both men eligible for the death penalty with true findings of the four special circumstances alleged under California Penal Code § 190.2 (hereafter "§ 190.2"): the burglary-murder special circumstance, § 190.2(a)(17)(vii), the robbery-murder special circumstance, § 190.2(a)(17)(i), the witness-murder special circumstance, § 190.2(a)(10), and the especially-heinous-atrocious-and-cruel-murder special circumstance, § 190.2(a)(14). JA 50. The prosecution pursued and obtained a death sentence against Sanders, but waived its request for a death sentence against Cebreros. JA 7-8, 54.

At the penalty phase, the State introduced evidence that Sanders had pled guilty to one count of robbery and had committed four other robberies in Orange County, California, 11 years earlier, and had served nearly three years in prison. JA 8, 54; RT 1855-83, 1894, 1900. At the start of the penalty phase, Sanders stated that he wanted no defense presented on his behalf, because he wanted neither a sentence of life imprisonment without the possibility of parole nor a death sentence. JA 8, 54, 105; RT 1837. Rather, insisting on his innocence, Sanders wanted to leave the courtroom and go home. RT 1837. Acquiescing in Sanders' request, his attorney presented no evidence or argument at the penalty phase. JA 8, 54, 105.

The jury was instructed in the statutory language of California Penal Code § 190.3 (hereafter "§ 190.3"). JA 148-50. The jury was told that it must weigh aggravating factors and mitigating factors. JA 150. The jury also was instructed as follows:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.
>
> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

JA 150. In his closing argument, the prosecutor urged the jury to return a death sentence, particularly emphasizing the "heinous, atrocious, and cruel" nature of the murder and the jury's "heinous, atrocious, and cruel" special circumstance finding. JA 143-44.

During its deliberations, the jury sent a note to the trial judge asking "what are the consequences if the jury is unable to arrive at a unanimous decision?" JA 151. The judge instructed the jury not to consider that possibility at all. JA 151. This second jury returned a death verdict, JA 152, which the trial judge confirmed and imposed. JA 153-55.

Direct Appeal and Habeas Corpus Proceedings. On September 27, 1990, on direct appeal, the California Supreme Court affirmed Sanders' convictions and death sentence. JA 112. The state court found that two of the four special circumstance findings were invalid – the burglary-murder special circumstance, JA 94, and the unconstitutionally vague heinous-atrocious-and-cruel-murder special circumstance. JA 98. Citing to *Zant v. Stephens*, 462 U.S. 862 (1983), and two prior state decisions, the state court concluded that the jury's consideration of the invalid burglary-murder and invalid heinous-murder special circumstances in imposing the death penalty on Sanders was "benign" and that "there was little chance defendant was prejudiced" by it. JA 99-100.

On December 20, 1993, Sanders filed an amended petition for a writ of habeas corpus in the United States District Court for the Eastern District of California.

On August 24, 2001, the district court denied Sanders' habeas petition. JA 8. On July 8, 2004, the Court of Appeals affirmed the denial of the petition as to Sanders' convictions but conditionally granted the petition as to the death sentence. JA 30. The circuit court first held that California is a weighing state for purposes of assessing the effect of an invalid aggravating factor on the imposition of a death sentence, JA 12-16, a proposition the State never disputed until seeking rehearing en banc. The circuit court next held that the California Supreme Court neither independently reweighed the aggravating and mitigating factors to determine the appropriate sentence nor conducted a constitutional harmless error analysis to determine that the error was harmless beyond a reasonable doubt. JA 16-19. Finally, the circuit court held that Sanders was entitled to relief because the error had a substantial and injurious effect or influence on the jury's death sentence, JA 19-25, a ruling that the State did not contest in its petition for writ of certiorari and does not genuinely dispute in its Brief on the Merits.

California's 1978 Capital-Sentencing Statute. In California, a defendant is eligible for the death penalty when the jury finds him guilty of first degree murder and finds true one of the special circumstances listed in § 190.2. *People v. Mickey*, 54 Cal.3d 612, 677, 818 P.2d 84, 117 (Cal. 1991). The trial of a death-eligible defendant then proceeds to a separate penalty phase pursuant to § 190.3, where the same jury chooses between death and life imprisonment without the possibility of parole.

Section 190.3 guides the jury throughout this sentence-selection process. It lists 11 sentencing factors which the jury "shall consider" – factors (a) through (k) – and instructs the jury to take them into account "if relevant."

Factor (a) contains two independent components: "the circumstances of the crime of which the defendant was convicted in the present proceeding" *and* "the existence of any special circumstances found to be true. . . ." § 190.3. Although § 190.3 on its face does not label the aggravating and the mitigating factors, the California Supreme Court has. At the time Sanders' death sentence was affirmed, the state court had made clear that only factor (a), factor (b), unadjudicated crimes involving the use or threat of force or violence, and factor (c), prior felony convictions, were aggravating. *People v. Hamilton*, 48 Cal.3d 1142, 1184, 774 P.2d 730, 755 (Cal. 1989). Thus, the special circumstance findings, which made Sanders death-eligible under § 190.2, also were aggravating factors at the penalty phase under § 190.3.

The remaining factors (d) through (k) were mitigating. See *People v. Gallego*, 52 Cal.3d 115, 200, 802 P.2d 169, 214 (Cal. 1990); *People v. Whitt*, 51 Cal.3d 620, 654, 798 P.2d 849, 869 (Cal. 1990). Under California law, residual or lingering doubt is a mitigating circumstance admissible under factor (k) and other enumerated factors. *People v. Cox*, 53 Cal.3d 618, 676-77, 809 P.2d 351, 384 (Cal. 1991); *People v. Thompson*, 45 Cal.3d 86, 134, 753 P.2d 37, 67 (Cal. 1988).

Section 190.3 prescribes the method the jury is to follow when it considers these sentencing factors in deciding whether a death-eligible defendant will live or die. Section 190.3 explicitly requires that the jury be instructed to weigh the aggravating factors against the mitigating factors. JA 141. Section 190.3 expressly mandates that the jury impose death if aggravation outweighs mitigation:

> [T]he trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.

JA 141. Conversely, § 190.3 directs the jury to impose life in the event that mitigation outweighs aggravation:

> If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

JA 141.

The state supreme court has imposed two strict limits on the presentation of aggravating factors under § 190.3. First, the prosecutor may only introduce evidence in aggravation that is relevant to a specific, listed statutory sentencing factor. *People v. Boyd*, 38 Cal.3d 762, 773-74, 700 P.2d 782, 790-91 (Cal. 1985). Second, the prosecutor may not argue that the absence of a mitigating factor is an aggravating factor. *People v. Davenport*, 41 Cal.3d 247, 289-90, 710 P.2d 861, 888 (Cal. 1985).

SUMMARY OF ARGUMENT

In 1976, the California Supreme Court held that California's then-current mandatory death penalty law violated the Eighth Amendment. *Rockwell v. Superior Court*, 18 Cal.3d 420, 556 P.2d 1101 (Cal. 1976). The state legislature responded in 1977, enacting a new capital punishment law. Under the 1977 statute, jurors deciding whether to sentence a defendant to death were permitted to consider not only the aggravating circumstances set forth in the statute, but any other matter the prosecution thought relevant to sentencing. The statute provided no guidance or limitation on the jury's sentencing discretion and said nothing about what role, if any, aggravating factors played in the decision to impose death. This statute properly has been held to be a nonweighing statute. *Williams v. Calderon*, 52 F.3d 1465, 1479 (9th Cir. 1995).

That is *not* the statute at issue in this case. Instead, this case involves the 1978 death penalty statute. Under the 1978 statute as applied in this case, jurors were limited to considering three aggravating factors specifically set forth in the statute; they were explicitly required to weigh the aggravating factors – which include the special circumstances – against the mitigating factors; and they could not impose death unless they found that the "aggravating circumstances outweigh[ed] the mitigating circumstances." JA 150. The Court has granted certiorari to determine if this statute creates a weighing scheme.

In deciding this question, it is significant that the state supreme court repeatedly has stated that the weighing of aggravating and mitigating circumstances is the core of the death penalty decision under the 1978 law. The state supreme court has noted that the very reason the 1977 statute was replaced was to ensure that the jury weighed specified aggravating factors against mitigation. And the state supreme court has analogized the 1978 statute to Florida's weighing statute. Indeed, in defending this statute before this Court, the State not only has conceded the centrality of weighing in the state statute, but it has gone further and explicitly admitted that California is a weighing state.

The State now takes a decidedly different tack. In effect, the State urges this Court to ignore the plain language of the 1978 law, the decisions of the state supreme court interpreting that law, and its own prior assurances as to how the statute works. The State urges the Court to take this extraordinary step because it now believes that two features of the 1978 statute are "unique" to California and preclude it from being considered a weighing state: (1) California's death-eligibility and penalty-selection criteria are not identical and (2) California allows the jury to consider the circumstances of the

crime in deciding whether a death-eligible defendant should live or die.

There is nothing unique about either of these features. The Court has held jurisdictions with these precise features to be weighing states. In fact, not only are there no decisions of this Court to support either of the State's arguments, but the suggestion that a jury in a weighing state may not consider the facts of a particular crime before deciding a capital defendant's fate is unfathomable.

In the final analysis, this Court decides if a jurisdiction is a weighing state by looking to see whether aggravating factors play a formal role in the decision to sentence a defendant to die. Where aggravating factors play no role in that decision, the jurisdiction is not a weighing state. Where aggravating factors play a specified role in that decision, as where the jury decides the penalty by formally weighing aggravating and mitigating factors, the jurisdiction is a weighing state. And where the jury considers invalid aggravating factors in a weighing state – where it puts invalid factors on death's side of the scale – Eighth Amendment error has occurred. *Sochor v. Florida*, 504 U.S. 527, 532 (1992).

That is exactly what happened here. The jury was told to decide if Sanders should die by weighing aggravating factors, which included the special circumstances found true at the guilt phase, against mitigating factors. The jury was told that it could not impose death unless it found that aggravation outweighed mitigation. The jury was told that it could not impose life unless mitigation outweighed aggravation. And in asking the jury to impose death, the prosecutor told the jury to weigh on death's side of the scale as aggravating factors two special circumstances which the state supreme court *itself* held invalid.

The State's argument in this case would require the Court to treat the 1978 law as if it were no different than

the 1977 law. The argument should be rejected; California is now a weighing state.

The Court of Appeals' decision to grant relief is without fault. The jury's consideration of two invalid aggravating factors was Eighth Amendment error. The circuit court properly applied the test for prejudice set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and found that this error had a substantial and injurious effect on the death verdict. The State did not even seek review of the lower court's *Brecht* analysis, arguing only that the state court's harmless error analysis bars relief in federal court.

The State is wrong. Under the Court's rules for cases *not* under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), such as this one, when a federal habeas court finds constitutional error in a state criminal trial, it must determine if the error had a substantial and injurious effect on the verdict. If so, relief is required. If not, relief must be denied. The State's focus on the intricacies of the state court's harmless error analysis is singularly inappropriate in this pre-AEDPA case.

But even if an inadequate state court harmless error analysis is a prerequisite to application of *Brecht* in a pre-AEDPA habeas case, relief was proper here. The state court here did not apply a constitutional harmless error standard, or anything close. Instead, it applied a state prejudice standard which not only permitted it to resolve the prejudice question without considering mitigation, but which affirmatively put the burden on Sanders to prove prejudice. The circuit court's decision to grant penalty phase relief should be affirmed.

ARGUMENT

I. CALIFORNIA IS A WEIGHING STATE BECAUSE IT REQUIRES THE JURY TO CHOOSE LIFE OR DEATH BY WEIGHING AGGRAVATING FACTORS, INCLUDING ANY SPECIAL CIRCUMSTANCES FOUND TRUE, AGAINST MITIGATING FACTORS AND PRECLUDES DEATH UNLESS AGGRAVATION OUTWEIGHS MITIGATION.

Until this case, no one has seriously questioned that California is a weighing state. Although this Court has not directly addressed the issue, the Court repeatedly has recognized that the California statute directs juries to weigh aggravating and mitigating circumstances in determining the penalty in a capital case. *Boyde v. California,* 494 U.S. 370, 377-78 (1990); *California v. Brown*, 479 U.S. 538, 540 (1987); *California v. Ramos,* 463 U.S. 992, 995 n.3 (1983). In addition, 14 years ago, two members of the Court pointed out that California is a weighing state. Dissenting from denial of certiorari in *Pensinger v. California*, 502 U.S. 930 (1991), Justice O'Connor, joined by Justice Kennedy, observed that California, like Mississippi, "requires its juries to weigh aggravating and mitigating circumstances" *id.* at 931, and concluded that the California Supreme Court's harmless error analysis after invalidating one of two special circumstances was incompatible with *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Id.* at 931-32.

Justices O'Connor and Kennedy were correct: California is a weighing state under this Court's death penalty jurisprudence. This conclusion results from a straightforward application of the clear distinction between weighing and nonweighing death penalty statutes that this Court anticipated over 20 years ago in *Zant v. Stephens*, 462 U.S. 862, established in *Clemons v. Mississippi,* 494 U.S. 738 (1990), reaffirmed in *Stringer v. Black*, 503 U.S. 222

(1992), and has applied repeatedly. The weighing nature of California's death penalty statute is seen on the face of the statute, in the state court's understanding of the statute, and in the penalty instructions and the prosecutor's argument to Sanders' jury. The purportedly "unique" features of the state law on which the State now focuses do not turn California into a nonweighing state. The circuit court's conclusion that California's 1978 death penalty law is a weighing statute is as unremarkable as it is correct.

A. The Constitutional Hallmark Of A Weighing Statute Is That The Aggravating Factors Are Assigned A Specific Role In The Process The Jury Must Follow When Deciding If A Defendant Should Live Or Die.

In *Zant v. Stephens*, 462 U.S. 862, this Court first addressed the question of whether a death sentence that rests in part on an invalid aggravating circumstance violates the Eighth Amendment. There, the defendant's death sentence was based partly on an aggravating circumstance of "substantial history of serious assaultive criminal convictions" which the Georgia Supreme Court had found unconstitutionally vague. *Id.* at 867. As Justice Stevens explained in his opinion for the Court, the answer depends on the function of an aggravating circumstance in the sentencing process. *Id.* at 864; *id.* at 896 (Rehnquist, J., concurring). In the Georgia statute at issue in *Zant*, an aggravating circumstance only defines death-eligibility. *Id.* at 872. Its sole function is to narrow the class of persons convicted of murder who may be subject to capital punishment. *Id.* at 874.

Beyond this important but discrete role, an aggravating circumstance in Georgia "does not play any role" in guiding the sentencer in the only other decision it makes – whether to impose the death penalty. 462 U.S. at 874; see also *id.* at 900 (Rehnquist, J., concurring). As this Court

explained, "In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstances, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 873-74 (footnote omitted). There is no requirement that the jury balance the aggravating and the mitigating circumstances in selecting the punishment. *Id.* at 874; *id.* at 894 (Rehnquist, J. concurring). The Court held that under this scheme, consideration of an invalid aggravating circumstance does not automatically require reversal of the death penalty. *Id.* at 890. The Georgia-type law is known as a "nonweighing" statute. *Stringer,* 503 U.S. at 229, 231.

Zant recognized that the capital-sentencing statutes of some states differ significantly from Georgia's. Under those statutes, the aggravating circumstance finding not only determines death-eligibility but "the law requires the jury to weigh the aggravating circumstances against the mitigating circumstances when it decides whether or not the death penalty should be imposed." 462 U.S. at 873 n.12. The Court withheld an opinion about the significance of an invalid aggravating circumstance "under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Id.* at 890.

In *Clemons v. Mississippi*, 494 U.S. 738, the Court answered the question left open in *Zant*. The defendant's death sentence was premised in part on Mississippi's "heinous, atrocious or cruel" aggravating circumstance, which the Mississippi Supreme Court acknowledged was unconstitutionally vague. *Id.* at 743. Under the Mississippi statute, aggravating factors have a specific role in the penalty-selection process: to impose death the jury is

explicitly required to weigh aggravating factors against mitigating factors. *Clemons*, 494 U.S. at 745 n.2. The Court was clear about what differentiated the Mississippi and Georgia capital-sentencing statutes:

> In Mississippi, unlike the Georgia scheme considered in *Zant*, the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances.

Id. at 745. States with such statutes are known as "weighing" states. *Id.* at 749.

In the 15 years since *Clemons*, this Court has reiterated this same straightforward approach to determining whether death penalty statutes create a weighing scheme. See *Parker v. Dugger*, 498 U.S. 308, 318 (1991); *Stringer v. Black*, 503 U.S. at 229; *Sochor v. Florida*, 504 U.S. at 532; *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992); *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *Lambrix v. Singletary*, 520 U.S. 518, 521 (1997). It has found that Arizona, Florida, Mississippi and the United States have weighing statutes and that Georgia and Virginia do not. See *Richmond*, 506 U.S. at 46 (Arizona); *Parker*, 498 U.S. at 318 (Florida); *Clemons*, 494 U.S. at 745 (Mississippi); *Zant*, 462 U.S. at 873-74 (Georgia); *Tuggle v. Netherland*, 516 U.S. 10, 11-12 & n.1 (1995) (Virginia); *Jones v. United States*, 527 U.S. 373, 377-78, 402 (1999) (United States).

The common strand in these cases is clear. In each of the weighing states, the aggravating circumstances are assigned a specific role in the selection decision: the sentencer must compare, consider, balance or weigh the aggravation in relation to the countervailing mitigation before it can condemn a defendant to die. Every member of the Court has endorsed this definition of a "weighing" state. See *Stringer*, 503 U.S. at 231-32 (Rehnquist, C.J., Kennedy, J., Stevens, J., O'Connor, J.); *Lambrix*, 520 U.S. at 521 (Rehnquist, C.J., Scalia, J., Kennedy, J., Souter, J., and Thomas, J.) and *id.* at 540 (Stevens, J., Ginsburg, J.

and Breyer, J., dissenting). In contrast, in each of the nonweighing states, the aggravating circumstances play no formal role in the selection decision, and the jury is not required to follow any particular process before it can impose a death sentence on a death-eligible defendant. *Zant*, 462 U.S. at 873-74; *Tuggle*, 516 U.S. at 11-12 & n.1.

The Court explained the reason for distinguishing between weighing and nonweighing states in *Stringer*. In a nonweighing state like Georgia, an invalid aggravating circumstance does not taint a death sentence because "aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case." *Stringer*, 503 U.S. at 229-30. The situation is vastly different in a weighing state, where the very function of the aggravating circumstances is to guide and constrain the sentencer's discretion. Under such a scheme, an invalid aggravating circumstance skews the sentencing process. *Id.* at 232. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Ibid.*; accord *Sochor*, 504 U.S. at 532.

Further, as *Stringer* noted, the use of an invalid aggravating factor in a weighing process is worse than the use of such a factor to determine death eligibility, for at the penalty selection stage, the invalid factor creates the risk of an arbitrary death judgment predicated on an "illusory circumstance." 503 U.S. at 235. Simply stated, labeling a factor as "aggravating" matters to the selection decision in a weighing state.

The Court made precisely this point in *Clemons*. As noted, the jury in *Clemons* sentenced the defendant to death by relying in part on an invalid heinous-atrocious-or-cruel aggravating circumstance. This Court correctly observed that even absent this aggravating factor, all the circumstances of the murder were properly before the

sentencing jury. 494 U.S. at 754 n.5. Thus, the only real harm to the defendant was the jury's weighing of the heinous-atrocious-or-cruel circumstance formally designated as aggravating by the Mississippi legislature.

This Court has been unambiguous: the weighing of an invalid aggravating factor in the sentencing calculus that leads to a death sentence violates the Eighth Amendment. *Sochor*, 504 U.S. at 532; see also *id.* at 539; *id.* at 542 (Rehnquist, C.J., with White, J. and Thomas, J. concurring in part and dissenting in part.) It undermines the individualized sentencing required in capital cases, *Stringer*, 503 U.S. at 232, and "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be. . . . " *Id.* at 235. This, in turn, "creates the possibility not only of randomness but also of bias in favor of the death penalty." *Id.* at 236.

B. California's 1978 Capital-Sentencing Law Under Which Sanders Was Condemned To Die Assigns A Specific Role To The Aggravating Factors In The Selection Decision And Thus Is A Weighing Statute.

California's 1978 death penalty statute fits squarely within the Court's repeated definition of a weighing scheme. The decisions of the California Supreme Court, which emphasize the importance of the weighing of aggravating and mitigating factors, show that California has a weighing statute. In this Court, the State previously depicted California as a weighing state. Moreover, the jury instructions explaining § 190.3 at Sanders' penalty phase, as well as the prosecutor's argument for a death sentence, indisputably prove that Sanders was condemned to death under a weighing statute. All establish that the 1978 law unequivocally assigns a specific role to the aggravating factors, including the special circumstances, in the selection decision, which is the defining feature of a weighing statute.

1. The California Supreme Court views the weighing of aggravating factors against mitigating factors as the core of the selection decision under the state's 1978 capital-sentencing statute.

The California Supreme Court, of course, is the final authority on the meaning of California law. See *Stringer*, 503 U.S. at 234. Although it never has directly declared whether the California death penalty law is a weighing or nonweighing statute, its decisions interpreting the 1978 capital-sentencing law unmistakably demonstrate that the state court views the weighing of aggravating and mitigating factors as the core of the capital penalty determination in California.

Under the 1978 statute, the jury is directed to "consider, take into account and be guided by" the statutorily-enumerated aggravating and mitigating factors and to "impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances." JA 141. According to the California Supreme Court, the very purpose of the 1978 death penalty initiative was to make a "crucial change in the method by which the jury determines whether to impose the death penalty. . . . " *Boyd*, 38 Cal.3d at 773, 700 P.2d at 790. The 1978 law deliberately abandoned the 1977 law's procedure, which told the jury to consider the aggravating and mitigating circumstances enumerated in the statute but "provided no further guidance or limitation on the jury's sentencing discretion," and in its place, adopted a "process of weighing the specific factors listed in the statute. . . . " *Ibid.*; accord *People v. Brown*, 40 Cal.3d 512, 544, 726 P.2d 516, 532-34 (Cal. 1985). In fact, the proponents of the 1978 initiative sought to "require that the penalty be determined by weighing the aggravating and mitigating factors" because they believed that a statute without this weighing requirement would be unconstitutional. *Boyd*, 38 Cal.3d at 773 n.5,

700 P.2d at 782 n.5. Although the decision in *Zant* proved their belief to be wrong, "[t]hat issue was an unsettled one in 1978, however, and the proponents' concern was justified." *Ibid.* Thus, the California Supreme Court found that the very point of the 1978 law was to enact a death penalty statute that was *not* like the Georgia statute held to be a nonweighing scheme in *Zant*.

Six months after *Boyd*, the California Supreme Court discussed the meaning of California's capital-sentencing statute in *People v. Brown*, 40 Cal.3d 512, 726 P.2d 516. The state court explained that although "weighing" is "a process which by nature is incapable of precise description," it requires the jury to weigh the sentencing factors to determine the appropriate penalty. 40 Cal.3d at 541, 726 P.2d at 532. Under *Brown*, the aggravating factors still play a specific, designated role in the jury's decision whether to impose the death penalty. And the jury's penalty choice still hinges on its weighing of the aggravating and mitigating factors. The state court applied the *Brown* construction in affirming Sanders' death sentence. JA 100.

Since *Boyd* and *Brown*, the California Supreme Court has reiterated that "the crux of the jury's decision is the weighing of aggravating and mitigating factors." *People v. Kaurish,* 52 Cal.3d 648, 706, 802 P.2d 278, 309 (Cal. 1990); see *People v. Bolin,* 18 Cal.4th 297, 343, 956 P.2d 374, 406 (Cal. 1998) (the standard instruction "'clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty'"); *People v. Arias,* 13 Cal.4th 92, 171, 913 P.2d 980, 1030 (Cal. 1996) (jury must weigh factors and "determine whether the balance of aggravation and mitigation makes death the appropriate penalty"); *People v. Duncan,* 53 Cal.3d 955, 978, 810 P.2d 131, 144 (Cal. 1991) (post-*Brown* instruction "clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating"); *People v. Hendricks,*

44 Cal.3d 635, 654, 749 P.2d 836, 846 (Cal. 1988) ("the jury's function under [the 1978] law [is] to weigh the applicable aggravating and mitigating factors and, *on that basis*, and that basis alone, to determine whether death is an appropriate penalty").

Moreover, both before and after deciding Sanders' case, the California Supreme Court acknowledged the distinct role of the special circumstances as aggravating factors at the penalty phase. In assessing whether an invalidated special circumstance requires reversal of the death sentence, the state court "'presume[s] that the jurors [followed their instructions and] considered the invalid special-circumstance findings *independent* of their underlying facts[.]'" *People v. Benson*, 52 Cal.3d 754, 793, 802 P.2d 330, 353 (Cal. 1990), quoting *People v. Hamilton*, 46 Cal.3d 123, 151, 756 P.2d 1348, 1364 (Cal. 1988) (emphasis added). Thus, as this Court did in *Clemons*, the state court also has recognized there is an aggravating value to statutorily-defined aggravating factors separate and apart from their underlying facts. See *Clemons*, 494 U.S. at 754 n.5. In other words, labels matter.

The state court's rulings in *Hamilton* and *Benson* speak directly to the very reason this Court distinguishes between weighing and nonweighing states. In a nonweighing state, the existence of an invalid aggravating factor does not necessarily skew the jury's decision as to punishment precisely because the jury is not required to assign the aggravating factor a specific role in the decision to impose death. This contrasts sharply with a weighing state, where the jury is specifically required to place the invalid aggravating circumstance on death's side of the scale. In such a jurisdiction, the jury's sentencing calculus is necessarily skewed by an invalid aggravating factor. *Stringer*, 503 U.S. at 229-30, 232.

Finally, in discussing § 190.3's instruction that the jury decide whether the aggravating circumstances outweigh the

mitigating circumstances, the California Supreme Court repeatedly has compared California's statute to Florida's "somewhat analogous 'weighing' statute." *Brown*, 40 Cal.3d at 542, 726 P.2d at 532; *People v. Brown*, 45 Cal.3d 1247, 1260 n.5, 756 P.2d 204, 212 n.5 (Cal. 1988) (noting that the Florida statute addressed in *Proffitt v. Florida*, 428 U.S. 242 (1976) "like California's, provided that the penalty should be determined by 'weighing' the aggravating and mitigating factors. . . ."). The California statute, like Florida's, allocates the aggravating factors a specific function in the sentencer's deliberations.[3]

In sum, the California Supreme Court, "which is the final authority on the meaning of [California] law, has at all times viewed the State's sentencing scheme as one in which [the weighing] of aggravating [and mitigating] factors [is] critical in the jury's determination whether to impose the death penalty." *Stringer*, 503 U.S. at 234-35. As this Court observed in *Stringer*, "[i]t would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Ibid.*

Nevertheless, that is exactly the approach the State takes in this case. For two main reasons, the State argues

[3] Although aggravating factors play an important role at the sentence-selection process in a weighing state, there is no requirement, as the State suggests, that a particular aggravating factor play a "key," "special," or "major" role. See Petitioner's Brief on the Merits (hereafter "PB") 13-14, 15, 18, 27. The question is whether the statute mandates that the finding of an aggravating factor plays some role in the selection process. See *Zant*, 462 U.S. at 874. If the statute does, it is a weighing statute, and consideration of an invalid aggravating factor on death's side of the scale is constitutional error. The qualitative description of the role played by a particular aggravating factor becomes significant only in determining whether consideration of the invalid aggravator in imposing a death sentence was harmless. But that question presupposes that the penalty was imposed under a weighing statute.

that the state court has concluded that California is a nonweighing state.

First, the State asserts that in reviewing the effect of invalid special circumstances considered as aggravating factors, the state court "has always relied on the 'nonweighing' state rules set out by this Court in *Zant*, just as it did in this case." PB 25. This assertion is false. In fact, in affirming death sentences under the 1978 law after invalidating special circumstances, the state court has relied on *Zant* in only three cases other than this one in the 22 years since *Zant* was decided. See *People v. Pensinger*, 52 Cal.3d 1210, 1271, 805 P.2d 899, 933 (Cal. 1991); *People v. Silva*, 45 Cal.3d 604, 632, 754 P.2d 1070, 1085 (Cal. 1988); *People v. Wade*, 44 Cal.3d 975, 998, 750 P.2d 794, 808 (Cal. 1988). Notably, two of these cases – *Silva* and *Wade* – predate *Clemons*. In this situation, a citation to *Zant* cannot possibly represent a considered choice between the rules announced in *Zant* and *Clemons*. In other cases, the state court did not cite *Zant* or indicate reliance on the nonweighing state rule. See, *e.g.*, *People v. Howard*, 1 Cal.4th 1132, 1195-96, 824 P.2d 1315, 1353 (Cal. 1992); *People v. Beardslee*, 53 Cal.3d 68, 95-96, 806 P.2d 1311, 1339 (Cal. 1991); *People v. Bonin*, 47 Cal.3d 808, 854, 765 P.2d 460, 487 (Cal. 1989); *People v. Adcox*, 47 Cal.3d 207, 251-52, 763 P.2d 906, 930 (Cal. 1988); *People v. Kimble*, 44 Cal.3d 480, 504, 749 P.2d 803, 817-18 (Cal. 1988); *People v. Allen*, 42 Cal.3d 1222, 1281-83, 729 P.2d 115, 152-53 (Cal. 1986). Thus, Sanders' case and *Pensinger* are the only decisions involving invalidated special circumstances since *Clemons* in which the state court relied on *Zant*. And in *Pensinger*, two members of this Court criticized the state court's reliance on the rule normally applicable to nonweighing states. 502 U.S. at 930-32.

More importantly, in the post-*Clemons* era, the California Supreme Court has specifically relied on *Clemons* and its progeny. For example, in *People v. Holt*, 15 Cal.4th

619, 693, 937 P.2d 213, 261 (Cal. 1997), the state court rejected the defendant's claim that the reversal of a special circumstance or a felony conviction, which are aggravating factors at the penalty phase, automatically requires reversal of the death penalty. The state court's explanation was simple:

> Harmless error standards may be applied to penalty phase error. (*Sochor v. Florida* (1992) 504 U.S. 527, 532; *Stringer v. Black* (1992) 503 U.S. 222, 230; *Clemons v. Mississippi* (1990) 494 U.S. 738.

Id. at 261 (parallel citations omitted). This citation to *Sochor, Stringer* and *Clemons* is incomprehensible if, as the State asserts, seven years earlier when it affirmed Sanders' death sentence, the state court already had concluded that California's 1978 law was a nonweighing statute.

The State's theory imbues the state court's citation to *Zant* in this case with far more significance than the single-sentence reference can bear. When the state court decided Sanders' direct appeal, it had not yet acknowledged that this Court had articulated different rules for assessing the effect of an invalid aggravating circumstance in weighing and nonweighing states. That occurred more than two years later in *People v. Bacigalupo*, 6 Cal.4th 457, 470-74, 862 P.2d 808, 815-18 (Cal. 1993). The state court's ambiguous citation to *Zant*, especially in light of *Holt*'s specific citation of the *Clemons* harmless error rule, is insufficient to serve as a "shorthand signal," *Sochor*, 504 U.S. at 540, for a holding that California is a nonweighing state – a proposition that the California Supreme Court, to this day, never has endorsed.

But perhaps the best answer to the State's current position is its prior position. Although now equating the state court's citation to *Zant* with a judicial finding that California is a nonweighing state, in the lower courts in

this case the State consistently took precisely the *opposite* view. For example, in the Court of Appeals, the State not only argued that the state court had actually followed *Clemons* in dealing with this error, but asserted that the state court's citation of *Zant* was insignificant:

> Far from ignoring *Clemons*, the California Supreme Court's opinion is in accord with *Clemons*, even though the court did not specifically cite that case in its analysis. . . . [¶] The California court's reliance on *Zant* was proper since it cited *Zant* only for the proposition that a conviction can be upheld even when there is an invalid factor in aggravation.

Sanders v. Woodford, Ninth Circuit No. 01-99017, Appellee's Brief at 44. The State took the same position in the District Court. See *Sanders v. Woodford*, United States District Court for the Eastern District of California, No. CV-F-92-5471 REC-P, Answer with Points and Authorities to Second Amended Petition for Writ of Habeas Corpus at 227. The State's attempt to argue the *Zant* citation in support of patently inconsistent positions fundamentally undercuts its most recent theory that the state court's reliance on *Zant* is tantamount to a holding that California is a nonweighing state.

Second, the State suggests that in *People v. Bacigalupo*, 6 Cal.4th 457, 862 P.2d 808, the California Supreme Court found that California is a nonweighing state because the court distinguished the 1978 California law from the Mississippi law addressed in *Stringer*. PB 25-26. The distinction, however, relates to a legal question not at issue here. *Bacigalupo* held that the sentencing factors enumerated in § 190.3 are not subject to the Eighth Amendment vagueness standard that *Stringer* applied to Mississippi's aggravating circumstances. *Bacigalupo*, 6 Cal.4th at 476, 862 P.2d at 819. That ruling is of no moment in this case, since there is no question that Sanders' jury weighed as aggravating factors the heinous-murder

special circumstance and the burglary-murder special circumstance that the state court later invalidated. On the other hand, *Bacigalupo* did not discuss the *Stringer* ruling that does pertain here, *i.e.*, the constitutional remedy that *Clemons* provides the state appellate court when the sentencer in a weighing state considers an invalid aggravating factor, like the special circumstances in this case, in imposing the death penalty. Although the California court acknowledged the rules of *Zant* and *Clemons* on the effect on an invalid aggravating circumstance in a nonweighing state like Georgia and a weighing state like Mississippi, it did not address how those rules apply to the California capital-sentencing statute. *Id.* at 472-74; 862 P.2d at 817-18. *Bacigalupo* does not answer the question now before this Court.

In the final analysis, there should be no dispute about whether the California Supreme Court views the weighing of aggravation and mitigation as the polestar of California's capital-sentencing procedure. Indeed, the very year that the state court affirmed Sanders' death sentence, the State, which now asserts California is a nonweighing state, underscored the centrality of California's weighing process. In *Boyde v. California*, 494 U.S. 370, the State successfully urged this Court to uphold its capital-case weighing instruction. In its brief, the State described the "weighing of aggravating and mitigating circumstances" as "the heart of the California procedure." Respondent's Brief on the Merits, No. 88-6613, at 40 n.12; see also *id.* at 72-75 (extolling the virtues of California's weighing requirement). The State analogized California's sentence-selection procedure to that of Florida, *id.* at 66-67, pointing out that Florida's law requires "a determination of whether aggravation outweighed mitigation, *the same as California's.*" *Id.* at 89 (emphasis added). Florida, of course, is a weighing state for *Clemons*' purposes. *Sochor*, 504 U.S. at 532; *Parker,* 498 U.S. at 318.

Two years later, the State unequivocally admitted in this Court that California is a weighing state. Opposing a petition for certiorari in another case challenging a death sentence based in part on invalidated special circumstances, the State agreed with the petitioner "that California is a weighing state. . . ." *Mickey v. California*, No. 91-1860, Response in Opposition to Petition for Writ of Certiorari at 11.

Given this view, it is not surprising that throughout the litigation of this case in state court, in the United States District Court, and before the panel of the United States Court of Appeals, the State never contested Sanders' assertion that California is a weighing state. See JA 156 (accepting that "the more stringent test of error" set forth in *Clemons* "may be required" and arguing for denial of the state habeas petition under its standards); *Sanders v. Woodford*, United States District Court No. CV F-92-5471 REC-P, Answer to Second Amended Petition for Writ of Habeas Corpus at 226-27; *Sanders v. Woodford*, Ninth Circuit No. 01-99017, Appellee's Brief at 42-49. The State's belated assertion on certiorari that California is *not* a weighing state, is at odds with this Court's definition of a weighing state, the language and meaning of § 190.3 as repeatedly articulated by the state supreme court, and its own prior positions. The State's current position must be rejected.[4]

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[4] In fact, the State did not argue that California is a nonweighing state until filing its petition for rehearing en banc in the Court of Appeals. Its litigation of the case on the premise that California is a weighing state constitutes sufficient grounds for dismissing certiorari as improvidently granted. For the State to ask this Court to reverse the Court of Appeals on a ground that the State did not assert until after that court had decided this case shows a disrespect for orderly procedure that the Court should not condone.

2. The jury instructions and the prosecutor's argument in this case leave no doubt that the jury was specifically told to weigh invalid aggravating factors in deciding if Sanders should die.

Even if this Court were to ignore the view of the California Supreme Court as to the meaning of its own law, the jury instructions in this case make clear that Sanders was sentenced under a weighing statute. The instructions commanded the jury, in deciding whether Sanders should live or die, to consider and weigh the aggravating and mitigating circumstances upon which it had been instructed. JA 150. Under the instructions, the jury could not return a penalty verdict without first determining the relative weight of the aggravating and mitigating factors. JA 150. The instructions specifically referred to the special circumstances, two of which the California Supreme Court later invalidated, as sentencing factors the jury must consider. They stated:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors if they are applicable:
>
> A, circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

JA 149.

The concluding instruction told the jury to weigh the aggravating and mitigating circumstances to decide Sanders' fate:

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.
>
> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

JA 150. These instructions unquestionably described a weighing statute.

The prosecutor reinforced this view of California's capital-sentencing process. He reminded the jury to consider the special circumstances, in addition to the circumstances of the crime, Sanders' robberies 11 years before the capital crime, and his conviction for robbery, as aggravating factors. JA 143-45. The prosecutor clearly identified the aggravating factors and the mitigating factors in accordance with state law. JA 143-47. And he highlighted the heinous-atrocious-and-cruel special circumstance:

> The murder of Janice Allen as you know, was willful and premeditated. It was a cold, calculated, callous act. You have already concluded and correctly so that it fell within the special circumstance known as especially heinous, atrocious and cruel murder, that it exhibited exceptional depravity, that it was a consciousless [*sic*], pitiless act committed against a young, defenseless woman in the prime of her life.

JA 143-44. The prosecutor's argument also placed heavy emphasis on the weighing instruction. He told the jurors they were required to consider the aggravating and mitigating factors. JA 143. He also reminded the jurors in no uncertain terms that if they found that the aggravation outweighed the mitigation, they were required to impose a death sentence:

> If you conclude that the aggravating circumstances in this case outweigh the mitigating circumstances, you shall impose the death penalty. In other words, you have got to look at the circumstances, the factors that the judge reads to

> you, make a determination if the aggravating circumstances outweigh the mitigating circumstances.
>
> If you conclude that they do, then it is your duty as jurors to return the death penalty in this case.

JA 143. And at the very end of his argument, the prosecutor repeated that same instruction to the jury. JA 147.

In short, under the instructions in this case, the jury's penalty decision was to be controlled by the weighing of the aggravating and mitigating factors. Unlike Georgia, but like Arizona, Florida, Mississippi, and the United States, California in this case ascribed a defined role to its aggravating factors at the selection stage. Unlike Georgia, California in this case did not leave the selection decision to an unguided jury. Rather, like Arizona, Florida, Mississippi, and the United States, California in this case mandated that the jury weigh the statutorily-designated aggravating factors, which included the special circumstances, against the mitigating circumstances before it imposed a death sentence. This prerequisite established that, for purposes of Sanders' trial, California is a weighing state.

C. The Purportedly Unique Features Of California's 1978 Capital-Sentencing Law Do Not Make It A Nonweighing Statute.

Against the plain language of § 190.3, the State urges this Court to hold that the statute does not mean what it says. The State primarily asserts that two purportedly unique features of the 1978 death penalty law render it a nonweighing scheme: (1) the statute's failure to limit the aggravating factors at the selection stage to the death-eligibility criteria, PB 12-16, 21; and (2) the nonpropositional nature of one of the aggravating factors, the "circumstances of the crime" aggravator. PB 19, 21-23. These arguments mistakenly latch onto peripheral aspects of

§ 190.3 and ignore what makes § 190.3 a weighing statute – its requirement that the jury consider enumerated aggravating circumstances that are given a specific function in the designated process for deciding the defendant's fate.

First, the State argues that to be a weighing state, California's aggravating factors at the selection stage must precisely mimic the special circumstances at the death-eligibility stage. PB 12-16, 21. The State cites no authority of this Court to support its position, and, in fact, the State's theory is simply wrong.

Mississippi is a weighing jurisdiction. *Stringer*, 503 U.S. at 229. In Mississippi, death eligibility is decided at the guilt phase through the definition of capital murder. Miss. Code Ann. § 97-3-19(2); *Ladner v. State*, 584 So.2d 743, 763 (Miss. 1991); *Stringer*, 503 U.S. at 232-33. At the selection stage, Mississippi does *not* limit its aggravating circumstances to its death-eligibility criteria. Although many aggravating circumstances reiterate the categories of capital murder, the prosecutor has the opportunity to prove two additional statutory aggravating circumstances: that, as in *Clemons*, the capital offense was "heinous, atrocious or cruel," Miss. Code Ann. § 99-19-101(5)(h), and that "[t]he defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person." Miss. Code Ann. § 99-19-101(5)(b). Thus, there is no identity between eligibility and selection factors in Mississippi.[5]

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[5] The State mistakenly asserts that death-eligibility is determined at the penalty phase of a Mississippi capital trial. PB 13-14. As shown above, in Mississippi death-eligibility is decided at the guilt phase with the definition of capital murder. At the time of *Clemons* and *Stringer*, every form of capital murder had a correlate aggravating circumstance; thus, the defendant entered the penalty phase with at least one aggravating circumstance already found against him. *Brown v. State*,

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The United States also is a weighing jurisdiction. *Jones*, 527 U.S. at 377, 398, 402; *id.* at 420-21 (Ginsburg, J., with Stevens, J., and Breyer, J., dissenting). Under the Federal Death Penalty Act of 1994, the finding of a statutory aggravating factor set forth in 18 U.S.C. § 3592 is required to make a defendant death-eligible. *Jones*, 527 U.S. at 377. The jury is then directed to weigh *other* aggravating factors, including nonstatutory aggravating factors, in selecting the penalty. *Ibid.* The United States does not restrict selection factors to eligibility factors.

Indeed, the State itself seems to recognize the difficulty in its position. The State concedes that the equivalence it urges between death-eligibility criteria and aggravating factors is not essential to the definition of a weighing state, for it occurs only "[i]n *most* 'weighing' states." PB 16 (emphasis added). Sanders' point here is simple: California, Mississippi and the United States are weighing jurisdictions without this congruence.

Second, the State's alternative argument – relying on the nonpropositional nature of the circumstances-of-the-crime aggravator – fares no better. The State suggests that this factor grants the jury unfettered sentencing discretion that somehow overrides the specified role of the aggravating factors to make California a nonweighing state like Georgia. See PB 19, 21-23.[6]

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682 So.2d 340, 354-55 (Miss. 1996); *Hill v. State*, 432 So.2d 427, 458 (Miss. 1983) (Hawkins, J., concurring in part and dissenting in part). Since *Clemons* and *Stringer*, another form of capital murder, *i.e.*, murder perpetrated on educational property, has been added which has no analog among the aggravating circumstances. Miss. Code Ann. § 97-3-19(2)(g).

[6] However broadly the State would like to read California's circumstances-of-the-crime aggravator, it cannot be equated with the all-encompassing Georgia statute, which permits the introduction of the crime facts and broad-ranging nonstatutory aggravating evidence including the defendant's general moral character and his predisposition

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The Court rejected this exact argument in *Clemons*. Mississippi is a weighing state in which the sentencing jury considers all the crime facts. In Mississippi, the jury is instructed that in deciding between death and life imprisonment it is to "consider the detailed circumstances of the offense for which the defendant was convicted." *Doss v. State*, 709 So.2d 369, 395 (Miss. 1996). The Mississippi Supreme Court repeatedly has upheld this instruction, explaining that to preclude the jury from considering the crime circumstances "would defy logic and reason" as well as the express language of the Mississippi statute and this Court's decision in *Tuilaepa v. California*, 512 U.S. 967 (1994). *Doss*, 709 So.2d at 396; accord *Jordan v. State*, 786 So.2d 987, 1026 (Miss. 2001). Indeed, in *Clemons*, this Court specifically noted that "[a]ll of the circumstances surrounding the murder already had been aired during the guilt phase of the trial" and that "a jury clearly is entitled to consider such evidence in imposing sentence." 494 U.S. at 754 n.5.

There is nothing remarkable in California and Mississippi directing their capital-sentencing juries to the circumstances of the defendant's crime. After all, they are "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Tuilaepa*, 512 U.S. at 976, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). As the Court stated in upholding California's circumstances-of-the-crime factor in *Tuilaepa*, "[w]e would be hard pressed to invalidate a jury instruction that

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to commit crimes. See *Zant*, 462 U.S. at 886 & n.22. In addition, much of the State's argument about California's nonpropositional sentencing factors and the structure of § 190.3 relates not to the question of whether California is a weighing state but to the question of whether the consideration of the invalid heinous-murder and burglary-murder special circumstances was harmless. See, *e.g.*, PB 17-18. See *ante* page 22, footnote 3.

implements what we have said the law requires." 512 U.S. at 976.

In short, neither of the State's observations about the California statute serves to distinguish it from schemes the Court unequivocally has held to be weighing. Equally important, both of the State's observations miss the mark. At the selection stage, this Court has been concerned primarily with the procedure by which a jury decides to impose a death sentence rather than with the substantive factors the jury is to consider in reaching that verdict. *California v. Ramos*, 463 U.S. 992, 999 (1983). Thus, the Court generally defers to "the State's choice of substantive factors relevant to the penalty determination." *Id.* at 1001; see *Payne v. Tennessee*, 501 U.S. 808, 824-25 (1991). In determining whether California is a weighing state, the question is whether § 190.3 assigns a definite role to the aggravating factors in the sentence-selection process that the jury must follow to impose the death penalty. Because it does, California is a weighing state. The substance of the factors – or whether they duplicate the death-eligibility factors – has nothing to do with this inquiry. If any invalid aggravating factor is considered as part of the sentencing calculus, then the jury, as the State acknowledges, "has considered a specific factor about the case that should never have informed its decision about the penalty." PB 9. That is the error – the skewing toward death – that the Eighth Amendment prohibits. *Sochor,* 504 U.S. at 532; *Stringer,* 503 U.S. at 232.

Indeed, the State's argument that the circumstances-of-the-crime aggravating factor trumps everything else in § 190.3 is refuted by *Stringer.* The Court there found that the Fifth Circuit "made a serious mistake" in *Johnson v. Thigpen*, 806 F.2d 1243 (5th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987), which interpreted Mississippi's capital-sentencing procedure very much like the State here reads California's. *Stringer*, 503 U.S. at 237. The Fifth Circuit

had held that because Mississippi adequately narrowed death-eligibility at the guilt phase, there was no constitutional problem in permitting the jury at the penalty phase to consider the "broad" and "open-ended" heinous-atrocious-or-cruel aggravating circumstance. *Johnson*, 806 F.2d at 1245-49. What this Court said about the Fifth Circuit's view of Mississippi's law could apply as well to the State's position in this case: "The [State] ignore[s] the [California] Supreme Court's own characterization of its law and accord[s] no significance to the fact that in [California] aggravating factors are central in the weighing phase of a capital sentencing proceeding." *Stringer,* 503 U.S. at 237.[7]

Further, the State here oppugns its position in this Court in *Boyde v. California*, 494 U.S. 370. In *Boyde*, the State defended §190.3's mandatory weighing of aggravating and mitigating circumstances as the mechanism by which California constrains the jury's sentencing discretion in order to avoid arbitrary and capricious death sentencing. *Id.*, No. 88-6613, Respondent's Brief on the Merits at 81-85. Having successfully argued to this Court in *Boyde* that California's strict weighing formula prevented juries from wielding unbridled discretion, the State abruptly shifts gears and now insists that simply telling a capital-sentencing jury to consider the facts of the very

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[7] The State correctly notes that the weighing process in California is not mechanical. PB 23. To the extent that the State suggests this makes § 190.3 a nonweighing statute, it is mistaken. In other weighing jurisdictions, the weighing process also is not mechanical or arithmetical. See *Tokman v. State*, 435 So.2d 664, 669 (Miss. 1983) (in Mississippi, the death penalty is not "imposed numerically" by counting the aggravating and mitigating circumstances); *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973) (in Florida, weighing is not a "mere counting process" but "a reasoned judgment as to what factual situations require the imposition of death"); see also *Jones*, 527 U.S. at 399 (in a case under the federal statute the jury was told that weighing is not a counting process).

murder for which it is punishing the defendant converts § 190.3's carefully guided process of weighing aggravation and mitigation into a wholly unguided, discretionary, nonweighing sentencing scheme.[8]

[8] The State also cites as distinguishing the California statute: (1) the statute's failure on its face to identify the aggravating and mitigating factors; (2) the statute's failure to require that the jury make findings as to those factors; and (3) the fact that the invalid special circumstances do not affect the evidence before the sentencing jury. The first two "distinctions" are irrelevant to the determination of whether a state is a weighing state. First, although §190.3 does not identify the aggravating and mitigating factors, the California Supreme Court has. See *ante* at page 8. The state court also has held that an instruction differentiating the sentencing factors is unnecessary, since jurors can "readily" identify which are aggravating and which are mitigating. *Benson*, 52 Cal.3d at 802, 802 P.2d at 359.

Second, the absence of written or oral jury findings beyond the verdict deciding the sentence also is irrelevant to the definition of a weighing state. There is no question that in California at least one aggravating factor is proved at the penalty phase, because the true findings of the special circumstances at the guilt phase must be in writing and necessarily become sentencing aggravators. Cal.Pen. Code § 190.4, subd. (a). Explicit jury findings may facilitate appellate review, but they are not necessary. See *Clemons*, 494 U.S. at 750 (appellate courts can reweigh aggravating and mitigating circumstances notwithstanding a lack of written jury findings regarding mitigation). Nor are they essential in a weighing state. Florida is a weighing state in which judge findings but not jury findings are required. See *Espinosa*, 505 U.S. at 1081-82 (holding that the jury's weighing of an invalid aggravating factor constituted Eighth Amendment error). So is California. See Cal.Pen. Code § 190.4, subd. (e) (judge shall state reasons for findings on the record).

The State's third "distinction" is no distinction at all, but a veiled request that the Court overrule *Clemons*. As this Court made clear in *Clemons*, instructing the jury to weigh an invalid factor is constitutional error even if the factor does not alter the evidentiary mix. *Clemons*, 494 U.S. at 754 n.5. Justices O'Connor and Kennedy observed that the California Supreme Court's decision to uphold another death sentence because the invalid special circumstances did not alter the penalty phase evidence was "irreconcilable with *Clemons*. . . . The California Supreme Court's conclusion, moreover, makes little sense:

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In short, none of the purportedly unique aspects of § 190.3 transforms California's 1978 death penalty law from a weighing to a nonweighing statute. The circuit court's decision that California is a weighing state should be affirmed.

II. THE COURT OF APPEALS CORRECTLY ORDERED A NEW PENALTY TRIAL BECAUSE THE JURY'S WEIGHING THE INVALID SPECIAL CIRCUMSTANCES AS AGGRAVATING FACTORS ON DEATH'S SIDE OF THE SCALE WAS PREJUDICIAL.

Having determined that California is a weighing state, the Court of Appeals correctly found the jury's consideration of two invalid aggravating factors was Eighth Amendment error. JA 11. Following circuit precedent, the Court of Appeals conducted a two-step analysis. First, the court analyzed the state court's affirmance of Sanders' death sentence despite invalidating two special circumstances and concluded that the state court erroneously failed to apply the federal constitutional harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967). JA 16-19. Second, the court assessed prejudice under the standard this Court articulated in *Brecht v. Abrahamson*, 507 U.S. 619, JA 19-25, and granted relief.

The State did not seek review of this second holding, the *Brecht* conclusion. *Brown v. Sanders*, No. 04-980, Petition for Writ of Certiorari at 4-14. And the State does not really dispute the circuit court's *Brecht* analysis. PB 28-32. Instead, in this pre-AEDPA case, the State challenges

All jury instruction errors would be harmless under this reasoning, because none of them add to or subtract from the evidence considered by the jury." *Pensinger*, 502 U.S. at 931 (dissenting from denial of certiorari).

only the circuit court's first ruling. It asserts that because the state supreme court "review[ed] this case according to the proper harmless-error standard," the federal court should not have granted relief. PB 30.

The State's position should be rejected. The circuit court's *Brecht* ruling is correct and unchallenged. Moreover, the circuit court's review of the state court's harmless error analysis, made in an excess of caution, was unnecessary but also is correct.

A. The Court Of Appeals Correctly Applied *Brecht* And Determined That The Jury's Consideration Of Two Invalid Special Circumstances In Imposing The Death Sentence Requires A New Penalty Trial.

When a federal court finds constitutional trial court error in a pre-AEDPA habeas case, the question of whether relief should be granted is relatively straightforward. Under *Brecht*, a federal habeas court must grant relief if the error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638. The Court consistently has applied this standard. See, *e.g.*, *Penry v. Johnson*, 532 U.S. 782, 795 (2001); *Calderon v. Coleman*, 525 U.S. 141, 146 (1998); *California v. Roy*, 519 U.S. 2, 4-5 (1996); *O'Neal v. McAninch*, 513 U.S. 432, 437-39 (1995).

None of these cases held, or even suggested, that before a federal court could apply *Brecht*, it had to analyze the state court's harmless error analysis. In fact, in *Brecht* this Court recognized that the state courts properly had applied the *Chapman* test to the constitutional error. 507 U.S. at 636. Nevertheless, the Court determined whether habeas relief was required by independently analyzing whether the error had a substantial and injurious effect or influence on the verdict. *Id.* at 638. Significantly, the Court did not, as a prerequisite to its harmless error analysis,

conduct a substantive review of the state court harmless error analysis. 507 U.S. at 636-39; accord *California v. Roy*, 519 U.S. at 4-6 (in order to grant relief for constitutional error which state courts found harmless, federal habeas court must apply *Brecht*).

This case, being a pre-AEDPA habeas petition, is governed by a direct inquiry into whether the error in the jury's weighing two invalid special circumstances requires relief under *Brecht*.[9] As to that inquiry, there is no dispute. The Court of Appeals found that reversal of the penalty verdict is required under *Brecht* for good reason. Indeed, although the State did not seek certiorari on this question, it is worth noting how careful that analysis was. The circuit court correctly concluded that weighing two invalid aggravating factors was prejudicial because this was a close case even in the absence of a formal mitigation defense. A unanimous verdict for death was not necessarily a foregone conclusion, as indicated by the first jury's inability to convict and the second jury's note asking about "the consequences if the jury is unable to reach a unanimous decision." JA 151.

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[9] The rule might be different, of course, under AEDPA. In cases governed by AEDPA, a federal court cannot grant relief on a federal claim unless the state court adjudication of that claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under this section, where a state court has found a constitutional error harmless, a federal habeas court may not grant habeas relief unless the state court's harmless error analysis is "contrary to or involved an unreasonable application of" the *Chapman* standard. See *Mitchell v. Esparza*, 540 U.S. 12, 15, 17-18 (2003). Under AEDPA, an analysis of the state court's harmless error analysis is required. *Ibid.* But the petition in this case was filed in 1993, nearly three years before AEDPA was signed into law. JA 8-9. Thus, as the State concedes, AEDPA "do[es] not apply to this case." PB 6 n.6; see also *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

The circuit court found that although the jury convicted Sanders of Allen's murder, the record left room for real uncertainty about the extent of his personal culpability and thus his deathworthiness. The State readily admitted both at trial and on appeal that the evidence does not show whether Sanders or Cebreros killed Allen, JA 158, 160, and the record is clear that one of the two men, and very possibly Sanders, wanted to leave the apartment after the robbery and before the blows were struck that wounded Boender and killed Allen. JA 6, 52. The issue of relative culpability is a "critical issue" in capital sentencing. *Green v. Georgia*, 442 U.S. 95, 97 (1979). As the circuit court found, "[t]here is good reason to believe that the jury may have had doubts about Sanders' role in the murder and that it may thus have been only marginally inclined to impose the death penalty." JA 23. Lingering doubt, which could be considered a mitigating factor under California law, *Cox*, 53 Cal.3d at 66-67, 809 P.2d at 384, is a powerful basis for a life sentence. Stephen P. Garvey, *Essay: Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998).

The circuit court further explained that the evidence also left room for substantial doubt about whether the killing was pre-planned or even intentional. JA 23-24. Although according to Maxwell, Sanders was worried that Boender could identify him after the failed robbery attempt, Thompson said that "Allen was not supposed to be dead" and her death "wasn't what was planned." JA 23; RT 1005. In addition, the manner of the killing – beating rather than shooting or stabbing – did not necessarily imply an intent to kill. JA 24. Unintentional homicides long have been considered less reprehensible, and thus deserving of less harsh punishment, than intentional

murders. See *Enmund v. Florida*, 458 U.S. 782, 800 (1982).[10]

The State's additional aggravating evidence was not overwhelming. As the circuit court explained, the robberies Sanders committed were aggravating, but they occurred 11 years before these crimes. JA 24.

Viewed in this context, the Court of Appeals rightly concluded that there was grave doubt about whether instructing the jury to weigh two invalid special circumstances had substantial and injurious effect or influence in determining the death verdict. JA 25. Weighed as an aggravating factor, the invalid heinous-murder special circumstance improperly informed the jury that it already had found that Allen's killing was the most egregious of murders. This is precisely what the prosecutor argued. Describing the murder as a "cold, calculated, callous act," the prosecutor focused on the jury's finding of the heinous-murder special circumstance. JA 143-44; see *ante* at page 29. He used the language of the special circumstance to remind the jurors that they already had found that the murder "exhibited exceptional depravity, that it was a consciousless [*sic*], pitiless act committed against a young, defenseless woman in the prime of her life." JA 144. The

[10] Other facts provided a basis for lingering doubt about Sanders' role in the crimes and his intent. None of the physical evidence at the crime scene was connected to either Sanders or Cebreros. JA 7. Maxwell was a liar, as she herself admitted. See *ante* at page 2. There was reason to question the reliability of Boender's identification of Sanders and Cebreros. See *ante* at pages 3-4. Donna Thompson, who had motive to rob and attack Boender and Allen, disappeared after being questioned by police and remained missing during both trials. JA 5; RT 205, 998-99. Neighbors saw two men outside of Boender's apartment around the time of the crimes who were not Sanders and Cebreros. JA 53. Moreover, Sanders presented witnesses who accounted for his whereabouts the entire evening that Allen was killed and offered an innocent explanation for his fingerprints on the duct tape that Maxwell claimed was to have been used in the Wednesday attempted robbery. JA 7, 53-54.

circuit court properly perceived that the jury likely relied on the invalid heinous-murder special circumstance. JA 21. Similarly, the circuit court accurately determined that the invalid burglary-murder special circumstance could not be considered harmless. JA 21. It erroneously permitted the jury to consider Allen's murder as among those the people of California had deemed worthy of capital punishment even if Sanders entered Boender's apartment only with the intent to commit an assault and had been the person who wanted to leave before the murder began. JA 21-22. Thus, the circuit court correctly understood that the jury likely considered the legally invalid "heinous, atrocious, and cruel" and "burglary" labels of the special circumstances as "decisive determinants" in sentencing Sanders to death. JA 23.

The Court of Appeals' careful *Brecht* analysis established that penalty relief is required in this case. This was the only prejudice analysis the circuit court had to conduct. Nevertheless, before undertaking its *Brecht* analysis and following recent circuit precedent, the circuit court concluded that the state court's harmless error analysis was inadequate under *Clemons* and *Sochor*. JA 11-12 citing *Morales v. Woodford*, 336 F.3d 1136 (9th Cir. 2003); JA 16-19. This preliminary analysis was unnecessary.

As five circuit courts have recognized, nothing in *Clemons* precludes federal habeas courts from performing their traditional inquiry into harmless error. Nor does *Clemons* suggest that a federal review of the state process is some kind of prerequisite to harmless error analysis. See *Williams v. Clarke*, 40 F.3d 1529, 1539-40 (8th Cir. 1994); *Coe v. Bell*, 161 F.3d 320, 334-37 (6th Cir. 1998); *Billiot v. Puckett*, 135 F.3d 311, 317-18 (5th Cir. 1998); *Davis v. Executive Director of Dept. of Corrections*, 100 F.3d 750, 768 n.18 (10th Cir. 1996); *Smith v. Dixon*, 14 F.3d 956, 975-77 (4th Cir. 1994). Plainly put, *Clemons* does not support the proposition, implicit in the ruling below, that a

state court's harmless error analysis can bar federal habeas courts from assessing the prejudicial impact of a constitutional error. Were it otherwise, the Court could not have undertaken its *Brecht* harmless error analysis in a number of cases. See, *e.g.*, *Coleman*, 525 U.S. at 143, 146; *Roy*, 519 U.S. at 3-4; *Brecht*, 507 U.S. at 626, 638.

Clemons, a direct review case, held that when a sentencer in a weighing state considers an invalid aggravating factor, a new penalty phase is not required in two situations. First, on direct appeal, a state reviewing court can reweigh the valid aggravating factors against the mitigating factors and itself decide if death is appropriate. 494 U.S. at 748-50. Second, on direct appeal, a state reviewing court can apply constitutional harmless error analysis and find that the sentencer's consideration of the invalid aggravating factor is harmless beyond a reasonable doubt. *Id.* at 752-53. To resolve the case, the Court had to determine which of these options (if any) the Mississippi Supreme Court had taken, and this determination required the Court to focus on the state court analysis. *Id.* at 750-54.

As *Clemons* teaches, if the state reviewing court itself weighs aggravation and mitigation and imposes a death sentence, then the defendant's death sentence no longer is tainted by the presence of an invalid aggravator. See 494 U.S. at 748-50. In that situation, the constitutionally invalid sentence imposed by the jury is cured by the constitutionally valid sentence imposed by the appellate court. See *Wainwright v. Goode*, 464 U.S. 78, 86-87 (1983) (Florida Supreme Court's independent reweighing without the improper aggravating circumstance remedied the trial court's tainted death sentence); *Coe*, 161 F.3d at 334 ("In reweighing, a state court effectively vacates the original sentence and resentences the defendant."). Thus, to determine if the defendant's sentence was still tainted, the

Court had to examine how the state supreme court had treated the error. *Clemons*, 494 U.S. at 751.

In this case, however, the California Supreme Court did not conduct appellate reweighing, as both the circuit court and the State note. JA 17; PB 28 n.14. Instead, the state court conducted some type of harmless error analysis. JA 17. In this situation, the error is not cured in the same sense as with the imposition of an untainted sentence through appellate reweighing. See *Smith*, 14 F.3d at 977 ("Harmless error analysis does not involve conducting a new sentencing calculus."). Rather, the error still exists but has been found not to have prejudiced the death sentence. There is no need to scrutinize the state reviewing court's analysis. The mere fact that the state court has performed a harmless error analysis does not immunize the error from harmless error review in federal court. Cf. *Brecht*, 507 U.S. at 626-29 (applying harmless error test even though state courts applied harmless error test); *Roy*, 519 U.S. at 5-6 (same).

In the final analysis, because California is a weighing state, there was constitutional error when the jury considered two invalid special circumstances as aggravating factors in sentencing Sanders to die. This error was not cured by appellate reweighing of the aggravation and mitigation. As with any other constitutional error in a pre-AEDPA habeas case, the proper approach is simply to apply *Brecht* and determine if relief is required. Because the State does not take issue with the circuit court's *Brecht* analysis, and because that analysis carefully considered the impact of the error on Sanders' death sentence, there is no reason to disturb the circuit court's conclusion.[11]

[11] In a footnote, the State suggests that the proper remedy in this case "is not to reverse this penalty but to remand the case for proper state court review." PB 32 n.16. As an initial matter, this argument is waived. The State never made this argument below nor has it ever

(Continued on following page)

B. The Court Of Appeals Unnecessarily But Correctly Determined That The State Court's Harmless Error Review Was Constitutionally Flawed.

Although the Court of Appeals did not need to review the state court harmless error analysis before applying *Brecht* in this pre-AEDPA habeas case, the conclusion reached in that review – that the state court "did not find, as it was required to do, that the error was 'harmless beyond a reasonable doubt,'" JA 17 – is entirely correct.

On direct appeal in state and federal courts, federal constitutional errors require reversal unless the beneficiary of the error proves it harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Under this standard for assessing constitutional errors, the burden of proving the error harmless is explicitly placed on the state. *Ibid.*

In this case, the state court did not articulate the standard it was applying. JA 98-100. It did, however, cite its prior decisions in *Silva*, 45 Cal.3d 604, 754 P.2d 1070 and *Allen*, 42 Cal.3d 1222, 729 P.2d 115. JA 98. In both cases, the state court applied its reasonable-possibility test, applicable to state law errors occurring in the penalty

suggested remand as a remedy for the state court's consideration of invalid aggravating factors. *Sanders v. Woodford*, No. 01-99017, Brief for Appellee at 42-49. The circuit court can hardly be faulted for failing to accede to a request the State never made.

Even setting aside the waiver issue, the State's position is meritless. Circuit courts throughout the country unanimously have rejected the idea that in lieu of assessing the prejudicial impact of a sentencer's consideration of an invalid aggravating factor (and deciding whether to grant relief), federal habeas courts should remand the case to the state courts to begin the process anew. See the circuit cases cited *ante* at page 42. As these cases demonstrate, there is no reason "to carve out an exception to the rule of general applicability announced in *Brecht* for trial errors occasioned by the sentencer's consideration of a vague aggravating circumstance." *Billiot v. Puckett*, 135 F.3d at 318.

phase of a capital case, which requires relief if there is a "reasonable possibility that [the] error affected the verdict." *Allen*, 42 Cal.3d at 1281, 729 P.2d at 152; see *Silva*, 45 Cal.3d at 632, 754 P.2d at 1085. The State concedes that by citing *Silva* and *Allen* in this case, the state court was applying its reasonable-possibility test. PB 29.

The State, however, argues that the state law test is the same as the *Chapman* standard for federal constitutional error. PB 29. This is wrong. California's reasonable-possibility test requires the defendant to establish that an error was prejudicial, whereas the *Chapman* standard requires the state to establish that the error was harmless. The state court has left no doubt about this obvious difference.

In *People v. Carter*, 30 Cal.4th 1166, 1221-22, 70 P.3d 981, 1016 (Cal. 2003), the California Supreme Court applied the reasonable-possibility test and denied penalty phase relief in a capital case precisely because "defendant fail[ed], under the state standard of review, to establish a reasonable possibility that the error affected the verdict." In *People v. Jackson*, 13 Cal.4th 1164, 1233-34, 920 P.2d 1254, 1293-94 (Cal. 1996), the state court applied the reasonable-possibility test and denied penalty phase relief because it found defendant's argument as to prejudice "unpersuasive." And in *People v. Brown*, 46 Cal.3d 432, 448, 758 P.2d 1135, 1145 (Cal. 1988) – the case in which the state court formally adopted the reasonable-possibility test for penalty phase errors – the court made clear that under the state test, affirmance was presumed unless prejudice was affirmatively established. These cases establish that under the reasonable-possibility test, the burden of proving an error prejudicial is on the defendant, and that absent an affirmative showing of prejudice, relief must be denied. Of course, this is starkly different from the standard set forth in *Chapman*, where the burden of proving an error harmless beyond a reasonable doubt is on

the state, and absent that showing, relief must be granted. 386 U.S. at 24.

There is a sound reason why the state law test for prejudice does not shift the burden to the state as is done under *Chapman*. The reasonable-possibility test was not designed to assess prejudice from a constitutional error; it was designed only to "assess[] the effect of state-law error at the penalty phase of a capital trial." *Brown*, 46 Cal.3d at 448, 758 P.2d at 1145. The state court repeatedly has recognized this difference, explicitly differentiating between the *Chapman* and reasonable-possibility standards and treating them as distinct tests. See *Brown*, 46 Cal.3d at 447-48, 758 P.2d at 1145; *People v. Gordon*, 50 Cal.3d 1223, 1267, 792 P.2d 251, 278 (Cal. 1990); *Mickey*, 54 Cal.3d at 682, 818 P.2d at 121; *People v. Welch*, 20 Cal.4th 701, 762, 976 P.2d 754, 794 (Cal. 1999). This distinction would make no sense if there was no genuine difference between the two standards.

The State primarily relies on two cases to support its position that the reasonable-possibility test, like the *Chapman* standard, also places the burden of proving harmlessness on the state. PB 29, citing *People v. Jones*, 29 Cal.4th 1229, 64 P.3d 762 (Cal. 2003) and *People v. Ashmus*, 54 Cal.3d 932, 820 P.2d 214 (Cal. 1991). In each case, the state supreme court broadly described *Brown*'s reasonable-possibility standard and *Chapman*'s proof-beyond-a-reasonable-doubt standard as the same "in substance and effect." PB 29. But neither *Jones* nor *Ashmus* even purported to address the burden of proof issue articulated by *Carter*, *Jackson* and *Brown*. *Jones*, 29 Cal.4th at 1264 n.11, 64 P.2d at 784 n.11; *Ashmus*, 54 Cal.3d at 965, 820 P.2d at 231. And *Carter*, *Jackson* and *Brown* all were quite clear on this point: the reasonable-possibility test requires affirmance unless the defendant

proves prejudice. In any event, both *Jones* and *Ashmus* postdate the state court's decision in this case. To paraphrase this Court, it is a fiction for the State to contend that in 1990 its courts relied on 1991 and 2003 decisions. *Stringer*, 503 U.S. at 236.[12]

Accordingly, the Court of Appeals was correct in concluding that the state court "did not find, as it was required to do, that the error was 'harmless beyond a reasonable doubt.'" JA 17. Indeed, a contrary conclusion would have required the court to assume that the state court had decided to ignore *Brown*. As this Court recently has recognized, however, the circuit court was not free to make such an assumption. See *Cone v. Bell*, ___ U.S. ___, 125 S.Ct. 847, 853 (2005) (federal courts may not assume that state courts did not comply with their own case law).

There is further proof that the state reasonable-possibility standard is not the same as the federal constitutional harmless-beyond-a-reasonable-doubt standard: the state court failed to consider the mitigating evidence in the record in its prejudice analysis. Under *Chapman*, "the harmlessness of an error is to be judged after a review of the entire record." *Yates v. Evatt*, 500 U.S. 391, 405 (1991), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991); see also *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988) (court reviews all evidence in applying *Chapman* standard to penalty phase error). When there is

[12] The state also cites *People v. Coffey*, 67 Cal.2d 204, 430 P.2d 15 (Cal. 1967) to support its position. PB 29. This citation is puzzling. *Coffey* was decided in 1967, preceding the state court's adoption of the reasonable possibility test by more than 20 years. Moreover, *Coffey*, a non-capital case, had nothing to do with state law error at capital penalty phase; rather, it involved a straightforward application of the *Chapman* test to constitutional error. *Id.* at 218-19, 430 P.2d at 25. *Coffey* does not aid the State's position.

an error at the penalty phase of a capital trial, a state court must consider the mitigating evidence in order to find the error harmless. See, *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (state court's harmless error analysis was inadequate where it "failed to evaluate the totality of the available mitigation evidence"). Indeed, this Court previously held that a purported harmless error analysis of a death sentence tainted by invalid aggravating circumstances was constitutionally inadequate when the state court ignored mitigating circumstances in the record. *Parker*, 498 U.S. at 322.

Here, as the circuit court appreciated, even in the absence of a formal mitigation defense, there was significant mitigating evidence about the circumstances of the crime presented at the guilt phase. JA 21-24. This evidence raised substantial uncertainty about whether Sanders killed Allen or wanted to leave before she was killed, whether Sanders intended that Allen be killed, and whether Allen's killing was pre-planned or even intentional. The jury was entitled to weigh this uncertainty as mitigation under § 190.3, factor (k). The state court, however, said nothing about this evidence in its prejudice discussion. See JA 98-100.

Thus, even if a flawed state court harmless analysis is necessary for application of *Brecht*, relief was proper here because the California Supreme Court did not conduct constitutional harmless error review.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.[13]

Respectfully submitted,

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[13] Sanders has responded to those portions of the State's briefing that address the questions presented in the State's Petition for Writ of Certiorari and on which certiorari was granted. He recognizes that, as a fallback position, the State's amicus has asked the Court to overrule its longstanding and firmly-established distinction between weighing and nonweighing states. Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 4. This issue plainly is not within the questions presented by the current Petition for Certiorari. Nor was the issue raised in Sanders' Brief in Opposition to the State's certiorari petition. As a general matter, when the Court wants briefing on whether a precedent should be overruled, and that issue has not been presented in either the certiorari petition or brief in opposition, the Court's practice is to enter an order directing the parties to address the issue. See, *e.g.*, *Payne v. Tennessee*, 498 U.S. 1076 (1991); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 952 (1969); see generally Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 5.11 at p. 313 (8th ed. 2002).

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IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-980

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

Contrary to Sanders' repeated arguments, California is not a "weighing" state within the meaning of this Court's jurisprudence on capital sentencing statutes because (1) a state statute's use of the term "weigh" at the penalty phase does not by itself determine the nature of a state's capital sentence selection process, and (2) California juries do not consider eligibility factors in deciding the appropriate penalty. The Ninth Circuit Court of Appeals' holding that California's death penalty statute is a "weighing" statute was therefore erroneous.

Moreover, the Ninth Circuit's finding there was reversible error incorrectly assessed the impact of the invalid special circumstances on the jury's penalty determination. In affirming Sanders' death penalty, the California Supreme Court's review applied a state harmless error standard that was sufficient to meet any constitutional objections. In any event, the invalid special circumstances had no substantial and injurious effect on the death verdicts because of the nature of California penalty phase trials and the facts of this case.

I.

CALIFORNIA IS NOT A "WEIGHING" STATE

Relying on the presence of the word "outweigh" and the references to special circumstances in the California statute and jury instructions, which set out the capital case penalty selection procedures, Sanders contends that California is a "weighing" state, as described in this Court's jurisprudence. Accordingly, Sanders argues, the impact on the sentence selection of the invalid use of two of the four special circumstances, which had been found true for death-eligibility purposes, should be measured under the "weighing" state rules set out in *Clemons v. Mississippi*, 494 U.S. 738 (1990). Sanders' argument is falsely premised, and it should be rejected because, when accurately assessed, California's penalty selection process is manifestly "non-weighing."

A. The Concept Of "Weighing" Is Too Amorphous To Use To Distinguish The States' Various Penalty Selection Processes

Sanders would determine the issue of whether a state has a "weighing" or "non-weighing" statute solely by the talismanic presence of the word "weigh" in the state's law. However, such a simplistic, purely mechanical approach is misguided and contrary to this Court's established "weighing"/"non-weighing" paradigm. As this Court has held, in order to be a "weighing" statute, a state law must require the weighing of sentencing factors which are also eligibility factors. *Clemons v. Mississippi*, 494 U.S. 738, 742-744.

As the State asserted in its brief on the merits, in a point tellingly unaddressed in Sanders' respondent's brief, all states require juries to weigh sentencing factors to some extent, whether the juries are directed to "weigh," "consider," or "balance." (PB, referring to California's Brief on the Merits, 23-24.) Both "weighing" and "non-weighing" states direct their juries to perform some variation of this same relative mental

process. It is not susceptible to precise naming, but if juries were doing anything *other* than weighing, considering, or balancing when they were thinking about the aggravating and mitigating factors in order to choose an appropriate penalty, their decisions would be unconstitutionally random. Meaningful evaluation of the aggravating and mitigating evidence necessarily involves comparing one against the other.

While "weighing" and "non-weighing" are useful shorthand descriptions of two general types of state penalty selection processes, the presence or absence of those precise terms is not the touchstone for categorizing a state's selection process. The mere fact that the California statute employs the term "weigh" to describe its penalty selection process does not, by itself, mean California should be labeled a "weighing" state. Indeed, in California, the selection of penalty is a normative process, with the jury selecting an "appropriate" penalty after assigning "whatever moral or sympathetic value" each juror individually deems fit the aggravating and mitigating evidence. *People v. Bacigalupo*, 6 Cal.4th 457, 470 (1993) (*Bacigalupo II*).

B. Whether A State's Penalty Selection Process Is "Weighing" Or "Non-Weighing" Is Determined By Examining The Entire Nature And Substance Of The State's Selection Procedures

In discerning from the tangle of the varied penalty selection characteristics of the states' statutes whether a particular statute merits the label "weighing," it is important to look at the nature of the items in the penalty selection equations. The impact of an invalid aggravating factor cannot be measured solely by whether the jury was directed to weigh; that impact must include looking at what was on the metaphorical penalty selection scale. In other words, the substance of the states' various aggravating factors play a pivotal role in whether a state's statute can be called "weighing."

The two hallmarks of a valid capital sentencing scheme are: (1) an eligibility decision, where the class of offenders subject to the death penalty is genuinely narrowed by the jury finding true applicable factors which pass Eighth Amendment vagueness standards; and (2) a sentence selection decision, where the jury's choice is individualized because it is based on the defendant's culpability and all relevant mitigating evidence. *Tuilaepa v. California*, 512 U.S. 967, 971-973 (1994). A "weighing" state requires juries to include eligibility factors in their penalty selection calculus.

1. The Reference To "Special Circumstances" In California's Capital Sentencing Factors Does Not Mean California Is A "Weighing" State

State statute terminology can be confusing because the various states use overlapping terminology to describe different concepts. Some states use "aggravating" to mean considerations which factor into both eligibility and sentence selection, whereas other states use it to mean simply sentence selection factors. In California, "special circumstances" are the narrowing criteria, and aggravating and mitigating factors are separate, strictly sentencing considerations. Sanders' entire argument is based on an inaccurate blurring of the term aggravating. (See, e.g., RB, referring to Sanders' Brief for Respondent, 11, 18, 31.)

In a "weighing" state, statutory eligibility factors are also the statutory sentencing aggravating factors. In those states, "aggravating factor" means a factor which *both* narrows the class of offenders for death eligibility purposes *and* militates in favor of death in the selection process. *Barclay v. Florida*, 463 U.S. 939, 954 (1983); *Clemons*, 494 U.S. at 745; *Maynard v. Cartwright*, 486 U.S. 356, 358 (1988). The eligibility finding is part of the sentencing process. *Clemons*, at 745[1].

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1. Sanders wrongly argues that Mississippi completes the eligibility decision at its guilt phase (RB 32). Mississippi does some narrowing for eligibility purposes at the guilt phase through the statutory definition of a capital crime, but additional narrowing occurs at the sentencing phase, where the jury must find one of a specified statutory list of aggravating circumstances to be true before a death penalty may be imposed. *Stringer v. Black*, 503 U.S. 222, 225 (1992).

In contrast, in "non-weighing" states, the eligibility factors are not part of the sentencing mix. In Georgia, while the eligibility decision occurs at the sentencing phase, and the eligibility factors are called "aggravating" factors, these factors are separate from the sentence selection itself. *Zant v. Stephens*, 462 U.S. 862, at 866 and 874 (1983). In Louisiana, the eligibility decision is complete at the guilt phase when the jury finds the defendant guilty of a capital crime. The eligibility factors play no role in the sentencing phase, where "aggravating" factors, which are solely sentencing factors, are considered. *Lowenfield v. Phelps*, 484 U.S. 231, 245-246 (1988).

When the eligibility and sentencing functions merge or overlap, there is a danger the resulting sentence is not an accurate assessment of the defendant's culpability and therefore the sentence is not appropriately individualized. What makes a state's capital statute "weighing" or "non-weighing" is whether eligibility factors, which narrow the class of offenders to include only those subject to death, play a role in the actual sentence selection. In "weighing" states, eligibility factors are part of the sentence selection, and in "non-weighing" states, they are not. As this Court said in *Zant*, the impact of an invalid aggravating factor on the validity of the sentence depends in part on "the *function* of the jury's finding of an aggravating circumstance under [a particular state's] capital sentencing statute. . ." *Zant*, 462 U.S. at 864, emphasis added.

In California, at the guilt phase, before the case can proceed to a sentencing phase, the jury must find true a "special circumstance," which is California's method of constitutionally narrowing the class of offenders eligible to receive the death penalty. *Tuilaepa*, 512 U.S. at 975. Thus, in California, as in

Louisiana, death eligibility is fully completed at the guilt phase of the trial and forms no part of the sentencing phase or the sentence selection. The eligibility process is over before sentencing begins.

Additionally, Sanders' argument that California is a "weighing" state depends on the inclusion of the phrase "the existence of any special circumstances found to be true" in sentencing factor (a), which directs the jury's attention to "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. . ." Cal. Pen. Code, § 190.3, subd. (a). Sanders claims that this phrase means the special circumstances do play a role in sentence selection, similar to other "weighing" states. (RB 23.)

However, the California Supreme Court and this Court have unequivocally held that factor (a) means simply facts of the offense, including the facts underlying the special circumstances. *Tuilaepa*, 512 U.S. at 976; *People v. Medina*, 11 Cal.4th 694, 779 (1995). In fact, the California Supreme Court, in rejecting defense claims that the special circumstances reference should be excised from factor (a), has made it clear that factor (a) means nothing more than the facts of the crime, and excising the reference to special circumstances might lead the jury to incorrectly conclude it could consider the facts of the crime but not the facts of the special circumstances. *People v. Cain*, 10 Cal.4th 1, 68 (1995); *People v. Morris*, 53 Cal.3d 152, 224 (1991). Thus, special circumstances do not themselves play an independent role (RB 8) in sentence selection because they are simply subsumed into the circumstances-of-the-crime sentencing factor.

The California Supreme Court has repeatedly held California's aggravating factors are purely sentencing factors and they therefore need not meet Eighth Amendment strictures for eligibility factors. *People v. Mendoza*, 24 Cal.4th 130, 192 (2000); *People v. Musselwhite*, 17 Cal.4th 1216, 1268 (1998); *Bacigalupo II*, 6 Cal.4th at 476-477. Stated another way, it does

not affect the validity of the sentence selection if an eligibility factor is invalid for Eighth Amendment eligibility purposes because sentence selection factors are not eligibility factors and therefore are not to be constitutionally tested under the same standards applicable to eligibility factors. And, since sentencing factors are not so measured, the phrase "special circumstances" in sentencing factor (a) can only mean, as noted above, that special circumstances have no sentencing role other than as part of the circumstances of the crime.[2/] In contrast, in Florida and Mississippi, both "weighing" states, the Eighth Amendment eligibility strictures do apply to sentencing factors because the sentencing factors are also eligibility factors. *Barclay*, 463 U.S. at 951, n.8, and 953, n.11; *Clemons*, 494 U.S. at 743; *Cole v. State*, 666 So.2d 767, 782 (1995).

The jury instructions do not show California is a "weighing" state. (RB 28-29.) The applicable instructions simply described the normative decision process, and they directed the jury to weigh the sentencing factors in aggravation and mitigation. JA 149-150; *Boyde v. California*, 494 U.S. 370,

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2. Sanders' implication that two Justices have determined California is a "weighing" state (RB 14, 37 in n. 8) is specious. *Bacigalupo II* answered the concerns of Justices O'Connor and Kennedy, who dissented from the denial of certiorari in *Pensinger v. California*, 502 U.S. 930 (1991). (See also *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Dissents from denial of certiorari are examples of "the purest form of dicta" and "potentially misleading.") After this Court granted certiorari and remanded *People v. Bacigalupo*, 1 Cal.4th 103 (1991) (*Bacigalupo I*), to California for reconsideration in light of *Stringer*, the California Supreme Court found, in *Bacigalupo II*, that the *Stringer* "weighing" state rule did not apply, and therefore California's *sentencing* factors did not need to meet the Eighth Amendment vagueness standards for *eligibility* factors; the Court specifically applied its holding to the sentencing factor (a) at issue in this case. *Bacigalupo II*, 6 Cal.4th at 479. Although one dissenting California justice opined *Stringer* should apply, and this Court would undoubtedly grant certiorari on that point, this Court, with neither of the *Pensinger* Justices dissenting, denied certiorari in *Bacigalupo II*. *Bacigalupo v. California*, 512 U.S. 1253 (1994). Thus, *Bacigalupo II* remains sound precedent.

377 (1990). Since the instructions did not put any invalid eligibility/narrowing factors on the sentencing scale, California is not a "weighing" state. *Stringer*, 503 U.S. at 229-230. Nor does the prosecutor's argument support Sanders' claim that California is a "weighing" state. (RB 29-30.) To the contrary, the prosecutor merely emphasized the facts underlying the special circumstances by arguing that the evidence in aggravation merited the death penalty. *People v. Hamilton*, 46 Cal.3d 123, 150 (1988).

In sum, unlike "weighing" states, and like "non-weighing" states, California juries do not weigh eligibility factors in choosing whether to sentence a death-eligible defendant to life in prison or execution. The sentencing calculus is not skewed (RB 22, 35) because, if the special circumstance is only invalid as an eligibility factor, but not as a sentencing factor, it has no special weight which distorts the sentence selection (RB 15) and there is nothing invalid on "death's side" of the metaphorical sentencing scale. *Bacigalupo II*, 6 Cal.4th at 475-477.

2. California Does Not Limit Which Sentencing Factors A Jury May Consider

In a "weighing" state, such as Mississippi or Florida, the dual eligibility/sentencing factor is the only aggravation a jury may weigh to determine the appropriate sentence. *Clemons*, 494 U.S. at 742-743, and n.1; *Barclay*, 463 U.S. at 953, n. 11, 954. When aggravation is thus limited, it has a prominent role in sentencing, and accordingly has the special weight *Zant* warns about. *Zant*, 462 U.S. at 891, *Stringer*., 503 U.S. at 235-237.

In "non-weighing" Georgia, the jury is directed that it may consider the eligibility factor in selecting a sentence, but the jury is not limited to that factor. *Zant v. Stephens*, 456 U.S. 410, 411, n.1 (1982), also cited in *Zant*, 462 U.S. at 889, n. 25. In Louisiana, even though the eligibility factors can be the same as the sentencing factors, it does not matter because the sentencing factors are performing no eligibility function in the sentence

selection process. *Lowenfield*, 484 U.S. at 246.

Moreover, neither Mississippi nor Florida has an overarching circumstances-of-the-crime sentencing factor. Miss. Code Ann., § 99-19-101, subd. (5); Fla. Stat. § 921.141, subd. (5). An overarching sentencing factor enormously increases the amount of ingredients–the evidence and considerations–in the sentencing mix. When a sentencing factor is invalidated, the evidence and circumstances of that factor are removed from the jury's sentencing consideration unless a catchall factor authorizes the jury to focus on them.

Unlike "weighing" states, the "non-weighing" states have sentence selection factors permitting the jury to consider the overall circumstances of the crime and the defendant in its penalty decision. Ga. Code Ann., § 17-10-30, subd. (b); La. Code Crim. Proc. Ann., Art. 905.2. This overarching sentencing factor applies even when a particular eligibility factor is declared invalid in a particular case. Thus, in a "non-weighing" state, the jury is not directed to consider the eligibility factor and is permitted to consider evidence beyond the eligibility factors. *Zant*, 462 U.S. at 872.

Sanders disputes this fact, claiming that Mississippi and the United States allow more than the eligibility factor as aggravation at the sentencing. (RB 32-34.) The Mississippi cases Sanders cites were decided in the 1990s, after Mississippi courts changed the law to allow circumstances of the crime to factor in the sentencing decision. At the time Stringer and Clemons were tried in 1982 and 1987 respectively, the only aggravation allowed to be considered in sentence selection was the statutory aggravating factor, which was also the eligibility factor. *Clemons*, 494 U.S. at 743, n. 1; *Clemons v. State*, 535 So.2d 1354, 1361 and 1364 (1988); *Coleman v. State*, 378 So.2d 640, 648 (1979).

The United States death penalty statute, 18 U.S.C. § 3591 et seq., has not been held to be a "weighing" statute. Contrary to Sanders' claim (RB 32), whether the statute was "weighing" was not directly at issue or explicitly decided in *Jones v. United*

States, 527 U.S. 373 (1999). What is clear is that in the federal statute, the eligibility factors are also the statutory aggravating factors. *Jones*, at 376-377. While the federal statute does allow for additional, nonstatutory aggravating factors to be considered, these must be pleaded and proven so they are brought in by the state, not the jury. Moreover, the statute has no "catchall" circumstances-of-the-crime aggravating factor.

California's procedure falls into the "non-weighing" category in this regard. The jury's consideration is not limited to any specified factor in aggravation. Additionally, to the extent "special circumstances" can be said to be involved in the sentencing mix at all, they certainly are not "central in the weighing phase. . ." *Stringer*, 503 U.S. at 237. In factor (a), California has a broad catchall circumstances-of-the-crime sentencing factor. Any impact from labeling of some of the facts of the crime as special circumstances is entirely diluted by the wide array of aggravating and mitigating considerations, in factor (a) and in all the other factors.

As the Ninth Circuit has recently noted, "[t]he California death penalty statute has a unique mechanism for guiding the jury's discretion." *Belmontes v. Brown*, 494 F.3d 1094, 1131 (9th Cir. 2005). Sentencing factors are not statutorily labeled aggravating or mitigating; the jury decides the character and applicability of the factors. As required by this Court, California sentencing is an individualized determination focused "the specifics of the crime and the background and character of the defendant." *Id.*

In California, the required eligibility, or narrowing, is complete before the sentencing phase begins. Sentencing is purely the selection of the appropriate penalty. Although the statute employs the term "weigh," California is not a "weighing" state, as that term of art has evolved in this Court's jurisprudence.

C. California Has Always Been A "Non-Weighing" State

Sanders claims the California Supreme Court has characterized California as a "weighing" state, analogized to "weighing" states' statutes in analyzing California's statute, and not consistently relied on *Zant* in assessing the impact of invalid special circumstances. (RB13, 19, 20, 23, 26-27.) His statements are wrong, take quotes out of context, and ignore the California Supreme Court's holding in *Bacigalupo II* and in subsequent cases.

The California Supreme Court has never held that California is a "weighing" state. As set out above, California juries weigh sentencing factors to reach a normative sentencing decision in capital penalty selection, but that does not make California a "weighing" state as this Court has defined the term of art because California juries do not weigh special circumstances and special circumstances are not sentencing factors.

While the California Supreme Court has analogized portions of the California statute to "weighing" states' statutes (RB 22-23), it has equally often analogized to "non-weighing" states' statutes. See, e.g., *Musselwhite*, 17 Cal.4th at 1267-1270; *People v. Montiel*, 5 Cal.4th 877, 943 (1993); *Bacigalupo II*, 6 Cal.4th 457. The Court has consistently reapplied its *Bacigalupo II* holding, namely that Eighth Amendment narrowing principles in *Stringer* do not apply to sentencing criteria. *People v. Mendoza*, 24 Cal.4th at 192; *Musselwhite*, 17 Cal.4th at 1266-1267; *People v. Avena*, 13 Cal.4th 394, 432 (1996). These holdings can only mean the Court has found California is not a "weighing" state.

This consistency is reflected in *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982), where the Court first found the heinous, atrocious, and cruel special circumstance invalid. It was invalidated *only* as a narrowing or eligibility factor, *but not* as a sentencing factor. The California Supreme Court and this Court have found factor (a) valid as a sentence selection factor.

Tuilaepa, 512 U.S. at 976; *People v. Jenkins*, 22 Cal.4th 900, 1051 (2000).

Sanders' claim that the Court has not relied on the *Zant* "non-weighing" standard when there are invalid special circumstances (RB 23-24) is incorrect. In post-*Clemons* cases, the Court has continued to rely on *Zant*, and in those cases where it does not cite *Zant* directly, it cites to its previous cases where it has applied *Zant* or the rule announced in *Zant*. See, e.g., *People v. Howard*, 1 Cal.4th 1132, 1195-1196 (1992). If there was any doubt California is a "non-weighing" state after *Clemons* (RB 25), *Bacigalupo II* resolved it by necessarily determining California is not a "weighing" state.[3] To the extent the California Supreme Court cites *Clemons*, it is to illustrate that harmless error analysis may be applied in the penalty phase, not because the Court has concluded that California is a "weighing" state.[4]

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3. Contrary to Sanders' contentions (RB 25-28), California has always consistently argued it is not a "weighing" state as that term is defined in *Clemons* and *Stringer*. Even if the State's position in other cases is relevant or binding in this case, there is nothing inconsistent between the briefs in the other cases Sanders cites and California's position in this case.

As to the State's brief in *Boyde* (RB 27-28, 36), there the issue was entirely different, involving the constitutionality of the direction to the jury that it "shall" impose death if aggravating sentencing factors outweigh mitigating. The brief conveys that juries are to weigh aggravating and mitigating *sentencing* factors, not special circumstances, and, as a result, California does not have mandatory sentence selection.

As to the *Mickey* brief (RB 28), the State noted that special circumstances cannot be equated with aggravating factors for sentencing purposes. *Mickey v. California*, No. 91-1860, Response in Opposition to Petition for Writ of Certiorari, p. 11. The gist of the *Mickey* brief is that *Stringer* does not apply to California because special circumstances do not play a role in sentencing, a position in accord with the state's position in this case.

4. Sanders' cite to *People v. Holt* (RB 24-25) is equally inapposite. There were no invalid special circumstances in *Holt*; the issue was the impact of alleged guilt phase error, and the California Supreme Court cites to "weighing" state cases were to reject the defendant's claim that any guilt phase error merits automatic penalty reversal. *People v. Holt*, 15 Cal.4th 619, 693 (1997).

Sanders' cite to *People v. Boyd*, 38 Cal.3d 762 (1985) (RB 20) does not persuade otherwise. *Boyd* did not discuss whether California was a "weighing" state; it merely described, as weighing, the process by which the jury assesses sentencing factors. Other California Supreme Court cases (RB 21-22) also describe the sentencing process, but not in the "weighing" state context, and the aggravating or mitigating sentencing factors referred to in those cases never means special circumstances. Special circumstances are not aggravating factors.[5]

II.
THE PENALTY IS VALID UNDER *BRECHT* OR THE STATE'S HARMLESS ERROR ANALYSIS

Sanders urges that the Ninth Circuit's *Brecht* (*Brecht v. Abrahamson*, 507 U.S. 619 (1993)) error analysis was correct

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5. Sanders' claim that California has conceded it is a "weighing" state (RB 7, 19, 25-26, 28) in this case is contradicted by the prior State briefs he cites. Beginning with the direct appeal in the California Supreme Court, the State has cited *Zant* for the proposition an invalid special circumstance did not necessarily result in an invalid penalty. Respondent's Brief in California Supreme Court 119. In the state habeas corpus proceeding, the State countered Sanders' claim California was a "weighing" state with the *Zant* "non-weighing" rule and tests. Informal Response to Habeas Corpus, pp. 184-185.

On federal habeas, in the district court, the State argued any error was harmless whether California was a "weighing" or a "non-weighing" state, which is not a concession (RB 26, 28), but the simple argument of alternative theories by the State. (Answer, pp. 222-227.)

On federal habeas appeal to the Ninth Circuit, the State's position remained the same. Far from conceding California was a "weighing" state, the State, in rebutting Sanders' arguments, assumed for the sake of argument that California was a "weighing" state to discuss the California Supreme Court's harmless error analysis. (Appellee's Brief 41-49.)

and was the only review of the penalty validity necessary, although he also endorses the Ninth Circuit's superfluous holding that the California Supreme Court's harmless error review was flawed. Both contentions lack merit.

A. The California Supreme Court Correctly Assessed The Impact Of The Invalid Special Circumstances

Contrary to Sanders' argument, *Brecht* does not authorize federal courts to ignore the findings of state courts. (RB 42-44-45.) *Brecht* is a rule respecting comity, designed to make reversal less likely on collateral review than on the already-exhausted direct appeal. *Brecht*, 507 U.S. at 637-638.

As the Ninth Circuit found in this case, there would be no error to review under *Brecht*, unless California is a "weighing" state, and unless the state court has failed to perform the corrective measures set out in *Clemons*. JA 12; *Morales v. Woodford*, 388 F.3d 1159, 1170-1171 (9th Cir. 2004).

First, since California is not a "weighing" state, then the invalid special circumstances played no independent role in the sentencing calculus. Since they did not result in the admission of otherwise inadmissible or inaccurate evidence, nor were they constitutionally invalid as a sentencing factor, the penalty should be affirmed under the "non-weighing" rule. *Tuggle v. Netherland*, 516 U.S. 10 (1995); *Zant*, 462 U.S. at 885; JA 98.

Second, even if California is a "weighing" state, the penalty must be affirmed because the California Supreme Court's harmless error review corrected the admission of the invalid aggravating circumstances. *Clemons*, 494 U.S. at 754; *Morales*, 388 F.3d at 1170. The California Supreme Court determined the error was harmless. (JA 98-100.) Although the Court did not cite *Chapman v. California*, 386 U.S. 18 (1967), or specifically intone the words "beyond a reasonable doubt," its citations and careful analysis make clear the Court accurately applied the *Clemons* standard. The Ninth Circuit erred in blithely dismissing the California court's review as not applying the *Chapman* standard without exploring the standard the Court

did apply. (JA 17-18.)

In finding harmless error, the California Supreme Court cited *People v. Silva*, 45 Cal.3d. 604 (1988) and *People v. Allen*, 42 Cal.3d 1222 (1986). (JA 98-99.) *Silva* and *Allen* apply the California reasonable possibility test to special circumstances error (i.e., whether it was reasonably possible the error altered the verdict). Thus, a reference to those cases is a reference to the application of that test. *Silva*, at 632; *Allen*, at 1281. Contrary to Sanders's argument (RB 47), the "reasonable possibility" test is the same, in substance and effect, as the *Chapman* beyond-a-reasonable-doubt standard, just as the State demonstrated in its brief and as this Court and the California Supreme Court have consistently held. *Brecht*, 507 U.S. at 637; *Chapman*, 386 U.S. at 24; *People v. Jones*, 29 Cal.4th 1229, 1264, n.11 (2003); PB 29.[6] In fact, in his opening and reply briefs in the California Supreme Court appeal, Sanders himself urged that the reasonable possibility test was the correct standard to be applied to the invalid special circumstances. (Appellant's Opening Brief, pp. 195-196; Reply Brief, p. 40.)

Sanders' reliance on California cases which reference both tests (RT 47) signifies nothing; those cases mention both tests as a redundancy, not alternatives, and cases which do explicitly compare the tests, cited above, hold they are the equivalent test.

Sanders claims the reasonable possibility test is distinguishable from *Chapman* because it places the burden of proof on the defendant whereas *Chapman* does not. (RB 46-48.) That is of no moment in this case because the State, the California Supreme Court, and the Ninth Circuit did not reject Sanders' claim on that basis. Rather, in each instance, the record was analyzed to determine prejudice. Similarly, in the cases Sanders cites, error was assessed by the appellate courts

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6. Although Sanders is "puzzled" by the State's citation to *People v. Coffey*, 67 Cal.2d 204, at 219-220 (1967) (RB 48, n.12), *Coffey* shows that California has always equated the reasonable possibility test with the *Chapman* test.

without regard to either party having a burden of proof. Sanders' burden of proof discussion is therefore irrelevant here.

B. The Ninth Circuit's *Brecht* Analysis Is Contradicted By The Facts

In this pre-AEDPA federal habeas corpus case, a federal court determines if invalid special circumstances had a "substantial and injurious effect" on the outcome of the case. *Brecht*, 507 U.S. at 638.[7] Both the Ninth Circuit's opinion on this issue and Sanders' brief are replete with factual misrepresentations or misunderstandings. (JA 23-24; RB 4-7, 40-41, 49.)

The *Brecht* standard favors convictions: instead of requiring any error to be found harmless beyond a reasonable doubt, the error must have had a demonstrable substantial and injurious effect on the verdicts. *Brecht*, 507 U.S. at 633. A *Brecht* reversal cannot be based on mere speculation, but must be based on a finding that the defendant was actually prejudiced; the Ninth Circuit has likened the standard to the California state error standard under which error is reversible only when it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. *Calderon v. Coleman*, 525 U.S. 141, 145-146 (1998); *Duncan v. Henry*, 513 U.S. 364 (1995), citing Ninth Circuit in dissent at p. 890. The *Brecht* standard was not met in this case, so the Ninth Circuit should not have reversed Sanders' penalty.

A number of the "facts" on which the Ninth Circuit and Sanders rely are no more than defense arguments and interpretations of the evidence. The jury evaluated the witnesses' credibility and the evidence presented by both sides at the guilt phase of the trial; after conviction, the facts are those jury determinations supporting the verdict which a rational trier

7. Although Sanders claims the State never disputed the Ninth Circuit's *Brecht* assessment in this case (RB 38, 39, 45), exactly the contrary is true (PB 30, n.15).

of fact could have found beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 314, 319 (1979).

As to speculation that the jury may have doubted Sanders' role or personal culpability in the murder (JA 23, RB 40), there is no question that Sanders was the leader of the crime spree: his botched robbery of the victims triggered the murder; he knew the victims; and he solicited the assistance of the henchman (codefendant Cebreros), who owed him a favor but who had no prior connection with the victims (JA 51). It does not matter who was the actual killer (JA 23-24, RB 40) because the jury specifically found, and the evidence supports, Sanders had the requisite intent to kill (JA 93-94).[8] As to which, if either, assailant wanted to leave the apartment (JA 24, RB 3, 40), there was no evidence that occurred before the murder, and, further, since Sanders was the leader, if he had wanted to leave, the assailants would have left (JA 52). Whether accomplice Maxwell was charged (JA 24) was irrelevant.

Although the Ninth Circuit suggests that beating, the killing method in this case, shows less intent to kill than stabbing or shooting (JA 24), the point is unsupported and somewhat irrational. A beating death generally cannot be accidental, especially under the facts of this case where the victim was struck multiple times in the head so viciously that her skull was fractured open and her brain matter exposed and lacerated. (JA 53; RT 502.)

As to the possible involvement of Maxwell or Thompson, or Maxwell's credibility as a witness, or Thompson's out-of-court statements (JA 23-24; RB 2, 5, 40), the jury resolved such questions against Sanders beyond a reasonable doubt by finding him guilty. And whatever role the women may have had in the crimes, it was Sanders and Cebreros who alone went to the victims' apartment and attacked the victims: the

8. Thus, Sanders' assertion (RB 49) there was uncertainty about whether he intended to kill the victim or whether the killing was intentional is blatantly inaccurate.

surviving victim recognized Sanders and selected both from a lineup. (JA 52-53.) To the extent Sanders had an alibi defense (RB 41, JA 53), he presented those witnesses, and the jury's guilty verdicts, which are supported by the evidence, show, beyond a reasonable doubt, the jury rejected that defense.

Finally, as to the suggestion that a previous trial in the case resulted in a hung jury indicates there might have been lingering doubt (JA 24; RB 1, 5, 39), that, too, is irrelevant. The prior jury quickly hung 11 to 1 for guilt, which suggests an aberrant, non-deliberating juror rather than lingering doubt. And, of course, the evidence, witnesses, and presentations at two trials are not the same. Sanders' suggestion that the second jury had some difficulty reaching a verdict (RB 39) is belied by the fact that the jury's penalty deliberations totaled just two hours, and the verdict was reached less than a half hour after the jury inquired about unanimity (CT 1880, 1882.)[9]

At the penalty phase, there was aggravating evidence of Sanders' prior robberies and, at Sanders' personal insistence, no independent mitigating evidence was presented.

When the facts and circumstances of this case, including the reality that special circumstances are not independently factored into the sentencing mix, are accurately viewed, it is clear that the invalid felony murder and heinous murder special circumstances had no substantial and injurious effect on the jury's penalty verdict. A proper application of *Brecht* would have resulted in affirmance of the district court's denial of Sanders' habeas petition.

In short, the Ninth Circuit's invalidation of the penalty phase in this case should be reversed because: (1) California is not a "weighing" state and proper application of the "non-weighing" state standard of *Zant* shows the invalid special circumstances had no impact on the sentence; (2) if California

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9. The Court did not rely on the prosecutor's argument as contributing to the error assessment, and, despite Sanders' argument (RB 41-42), there was nothing in the penalty argument which did so.

were a "weighing" state, the state supreme court's cautionary alternative assessment of the invalid special circumstances showed any error was harmless under the equivalent of the *Clemons* standard; and (3) in any event, there was no actual prejudice and no substantial and injurious effect on the penalty verdict, and therefore no reversal was warranted under *Brecht*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: September 1, 2005

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BROWN, WARDEN *v.* SANDERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–980. Argued October 11, 2005—Decided January 11, 2006

In convicting respondent Sanders of, *inter alia*, first-degree murder, the jury found four "special circumstances," each of which rendered him death eligible under Cal. Penal Code Ann. §190.2. At the penalty phase, the jury was instructed to consider a list of sentencing factors, including "[t]he circumstances of the crime . . . and the existence of any special circumstances found to be true," §190.3(a), and sentenced him to death. The State Supreme Court invalidated two of the special circumstances on direct appeal, but nonetheless affirmed the conviction and sentence. The Federal District Court subsequently denied Sanders habeas relief, rejecting his claim that the jury's consideration of invalid special circumstances rendered his death sentence unconstitutional. Reversing, the Ninth Circuit applied the rules for "weighing" States, see *Stringer* v. *Black*, 503 U. S. 222, rather than "non-weighing" States, see *Zant* v. *Stephens*, 462 U. S. 862, and found that Sanders had been unconstitutionally deprived of an individualized death sentence.

Held:

1. The requirement that States limit the class of murderers to which the death penalty may be applied, *Furman* v. *Georgia*, 408 U. S. 238 *(per curiam)*, is usually met when the trier of fact finds at least one statutory eligibility factor at either the guilt or penalty phase. Once this narrowing requirement has been satisfied, the sentencer must determine whether an eligible defendant should receive the death penalty; many States channel this function by specifying aggravating factors (sometimes identical to the eligibility factors) that are to be weighed against mitigating considerations. In answering the question confronted here—what happens when the sentencer imposes the death penalty after finding a valid eligibility factor, but

Syllabus

under a scheme in which another eligibility factor is later held invalid—this Court has set forth different rules for so-called weighing and non-weighing States. In a weighing State, the sentencer could consider as aggravation only specified eligibility factors. Where the sentencer relied on an eligibility factor that was later invalidated, the sentencer was erroneously invited to count the invalid factor as weighing in favor of death, thus "skewing" the weighing process, *Stringer*, *supra*, at 232. Such automatic skewing would not necessarily occur in a non-weighing State, however, which permitted the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors. This weighing/non-weighing scheme seems needlessly complex and incapable of providing for the full range of variations. This Court is henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. Pp. 3–9.

2. The jury's consideration of invalid special circumstances in Sanders' case gave rise to no constitutional violation. In California, the "special circumstances" listed in §190.2 are the eligibility factors designed to satisfy *Furman*'s narrowing requirement. If the jury finds the existence of one of those circumstances, it must "take into account" a *separate* list of sentencing factors, including §190.3(a)'s "circumstances of the crime" factor. That factor has the effect of rendering all the specified factors nonexclusive, thus making California (in this Court's prior terminology) a non-weighing State. Setting aside the weighing/non-weighing dichotomy and applying the more direct analysis set out here, two of the four special circumstances were invalidated, but the remaining two are sufficient to satisfy *Furman*'s narrowing requirement and alone rendered Sanders death eligible. Moreover, all of the facts and circumstances admissible to prove the invalid eligibility factors were also properly adduced as aggravating facts and circumstances under the "circumstances of the crime" sentencing factor. Even if §190.3(a)'s direction to consider "the existence of any special circumstances found to be true" placed special emphasis upon the facts and circumstances relevant to the invalid factors, that impact "cannot fairly be regarded as a constitutional defect in the sentencing process," *Zant*, *supra*, at 889. Pp. 9–12.

373 F. 3d 1054, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS,

Syllabus

C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–980

JILL L. BROWN, WARDEN, PETITIONER *v.* RONALD L. SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 11, 2006]

JUSTICE SCALIA delivered the opinion of the Court.

We consider the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process.

I

Respondent Ronald Sanders and a companion invaded the home of Dale Boender, where they bound and blindfolded him and his girlfriend, Janice Allen. Both of the victims were then struck on the head with a heavy, blunt object; Allen died from the blow. Sanders was convicted of first-degree murder, of attempt to murder Boender, and of robbery, burglary, and attempted robbery.

Sanders' jury found four "special circumstances" under California law, each of which independently rendered him eligible for the death penalty. See Cal. Penal Code Ann. §190.2 (West Supp. 1995). The trial then moved to a penalty phase, at which the jury was instructed to consider a list of sentencing factors relating to Sanders' background and the nature of the crime, one of which was "[t]he circumstances of the crime of which the defendant

was convicted in the present proceeding and the existence of any special circumstances found to be true." §190.3(a) (West 1999). The jury sentenced Sanders to death.

On direct appeal, the California Supreme Court declared invalid two of the four special circumstances found by the jury. It nonetheless affirmed Sanders' death sentence, relying on our decision in *Zant* v. *Stephens*, 462 U. S. 862 (1983), which, it said, "upheld a death penalty judgment despite invalidation of one of several aggravating factors." *People* v. *Sanders*, 51 Cal. 3d 471, 520, 797 P. 2d 561, 589–590 (1990). It affirmed the conviction and sentence in all other respects. We denied certiorari. *Sanders* v. *California*, 500 U. S. 948 (1991).

Sanders then filed a petition for a writ of habeas corpus pursuant to 28 U. S. C. §2254 in the United States District Court for the Eastern District of California, arguing, as relevant here, that the jury's consideration of invalid special circumstances rendered his death sentence unconstitutional.[1] After Sanders exhausted various state remedies, the District Court denied relief.

The Court of Appeals for the Ninth Circuit reversed. *Sanders* v. *Woodford*, 373 F. 3d 1054 (2004). It concluded that "the California court erroneously believed that it could apply the rule of *Zant* v. *Stephens*, 462 U. S. 862 (1983)—which is applicable only to nonweighing states—and uphold the verdict despite the invalidation of two special circumstances because it was upholding other special circumstances." *Id.*, at 1064 (citations omitted). Finding California to be a weighing State, and applying the rules we have announced for such States, see *Stringer* v. *Black*, 503 U. S. 222, 232 (1992), the Ninth Circuit con-

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[1] Because Sanders filed his habeas petition before April 24, 1996, we do not apply the substantive review standards required by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. See *Lindh* v. *Murphy*, 521 U. S. 320, 327 (1997).

cluded that California courts could uphold Sanders' death sentence only by finding the jury's use of the invalid special circumstances to have been harmless beyond a reasonable doubt or by independently reweighing the sentencing factors under §190.3. Since, it continued, the state courts had done neither, Sanders had been unconstitutionally deprived of an "individualized death sentence." 373 F. 3d, at 1064. We granted certiorari. 544 U. S. ____ (2005).

II

Since *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, we have required States to limit the class of murderers to which the death penalty may be applied. This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase. See *Tuilaepa* v. *California*, 512 U. S. 967, 971–972 (1994).[2] Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it. Most States channel this function by specifying the aggravating factors (sometimes identical to the eligibility factors) that are to be weighed against mitigating considerations. The issue in the line of cases we confront here is what happens when the sentencer imposes the death penalty after at least one

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[2]Our cases have frequently employed the terms "aggravating circumstance" or "aggravating factor" to refer to those statutory factors which determine death eligibility in satisfaction of *Furman*'s narrowing requirement. See, *e.g.*, *Tuilaepa* v. *California*, 512 U. S., at 972. This terminology becomes confusing when, as in this case, a State employs the term "aggravating circumstance" to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty. See Cal. Penal Code Ann. §190.3 (West 1999). To avoid confusion, this opinion will use the term "eligibility factor" to describe a factor that performs the constitutional narrowing function.

valid eligibility factor has been found, but under a scheme in which an eligibility factor or a specified aggravating factor is later held to be invalid.

To answer that question, our jurisprudence has distinguished between so-called weighing and non-weighing States. The terminology is somewhat misleading, since we have held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence. See, *e.g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982). The terminology was adopted, moreover, relatively early in the development of our death-penalty jurisprudence, when we were perhaps unaware of the great variety of forms that state capital-sentencing legislation would ultimately take. We identified as "weighing State[s]" those in which the only aggravating factors permitted to be considered by the sentencer were the specified eligibility factors. See, *e.g.*, *Parker* v. *Dugger*, 498 U. S. 308, 313, 318–319 (1991) (citing Fla. Stat. §921.141(3)(b) (1985)); *Richmond* v. *Lewis*, 506 U. S. 40, 47 (1992) (quoting Ariz. Rev. Stat. Ann. §13–703(E) (1989)). Since the eligibility factors by definition identified distinct and particular aggravating features, if one of them was invalid the jury could not consider the facts and circumstances relevant to that factor as aggravating in some other capacity—for example, as relevant to an omnibus "circumstances of the crime" sentencing factor such as the one in the present case. In a weighing State, therefore, the sentencer's consideration of an invalid eligibility factor necessarily skewed its balancing of aggravators with mitigators, *Stringer*, 503 U. S., at 232, and required reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors), *ibid.*

By contrast, in a non-weighing State—a State that

permitted the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors—this automatic skewing would not necessarily occur. It would never occur if the aggravating factors were entirely different from the eligibility factors. Nor would it occur if the aggravating factors *added* to the eligibility factors a category (such as an omnibus "circumstances of the crime" factor, which is quite common) that would allow the very facts and circumstances relevant to the invalidated eligibility factor to be weighed in aggravation under a different rubric. We therefore set forth different rules governing the consequences of an invalidated eligibility factor in a non-weighing State.[3] The sentencer's consideration of an

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[3] JUSTICE BREYER contends that harmless-error review applies in *both* weighing and non-weighing States. See *post*, at 8–12 (dissenting opinion). It would be strange indeed to discover at this late stage that our long-held distinction between the two sorts of States for purposes of reviewing invalid eligibility factors in fact made no difference. Cf., *e.g.*, *Stringer* v. *Black*, 503 U. S. 222, 232 (1992) (weighing/non-weighing distinction is "of critical importance"). Not surprisingly, the Courts of Appeals have uniformly understood that different rules apply to weighing and non-weighing States, and that harmless-error review is necessary only in the former. See, *e.g.*, *Sanders* v. *Woodford*, 373 F. 3d 1054, 1059–1060 (CA9 2004); *Flamer* v. *Delaware*, 68 F. 3d 736, 746–749 (CA3 1995); *Williams* v. *Cain*, 125 F. 3d 269, 281 (CA5 1997).

Our own cases, moreover, are flatly inconsistent with requiring harmless-error review in both types of States. As JUSTICE BREYER notes, *post*, at 8, *Zant* v. *Stephens*, 462 U. S. 862 (1983), did endorse the Georgia Supreme Court's holding that attaching the statutory label "aggravating" to the invalid eligibility factor had an "inconsequential impact on the jury's decision regarding the death penalty," *id.*, at 889 (internal quotation marks omitted). But the core holding is what we said next: "More importantly, . . . *any possible impact* cannot fairly be regarded as a constitutional defect in the sentencing process." *Ibid.* (emphasis added); see also *post*, at 11–12. *Zant* must therefore be read not as holding that any constitutional error was harmless, but as rejecting respondent's claim of constitutional error.

Neither *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), nor *Stringer* says anything to the contrary. JUSTICE BREYER points out that *Clemons*' harmless-error discussion focused on the emphasis given to the invalid

invalid eligibility factor amounts to constitutional error in a non-weighing State in two situations. First, due process requires a defendant's death sentence to be set aside if the reason for the invalidity of the eligibility factor is that it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," or that it "attache[s] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty." *Zant*, 462 U. S., at 885. Second, the death sentence must be set aside if the jury's consideration of the invalidated eligibility factor allowed it to hear evidence that would not otherwise have been before it. See *id.*, at 886; see also *Tuggle* v. *Netherland*, 516 U. S. 10, 13–14 (1995) *(per curiam)*.[4]

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factor, rather than on the fact that Mississippi is a weighing State, but that is hardly relevant: Our discussion of *how* harmless-error analysis should be conducted (the issue in the passage from *Clemons* that JUSTICE BREYER cites, 494 U. S., at 753–754) says nothing about *when* that analysis should be conducted (the issue addressed by the weighing/non-weighing distinction). On the latter question, *Clemons* maintains the distinction envisioned in *Zant*, see 462 U. S., at 890–891, between Georgia (a non-weighing State) and Mississippi (a weighing State), see *Clemons*, *supra*, at 745. Likewise, *Stringer* specifically distinguishes between non-weighing States, in which "the fact that [the jury] also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty," 503 U. S., at 232, and weighing States, in which "constitutional harmless-error analysis or reweighing at the trial or appellate level" is required, *ibid.*

[4]The fact that a sentencer's consideration of an invalid eligibility factor in a non-weighing State may nonetheless amount to constitutional error explains *Tuggle*'s characterization of *Zant* as holding "that a death sentence supported by multiple aggravating circumstances *need not always* be set aside if one aggravator is found to be invalid," 516 U. S., at 11 (emphasis added); cf. *post*, at 12 (BREYER, J., dissenting), as well as our related comment in *Clemons* that, "[i]n a [non-weighing] State like Georgia, . . . the invalidation of one aggravating circumstance *does not necessarily* require an appellate court to vacate a death sentence and remand to a jury," 494 U. S., at 745 (emphasis

This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations. For example, the same problem that gave rise to our weighing-State jurisprudence would arise if it were a sentencing factor, and *not* an eligibility factor, that was later found to be invalid. The weighing process would just as clearly have been prima facie "skewed," and skewed for the same basic reason: The sentencer might have given weight to a statutorily or constitutionally invalid aggravator.[5] And the prima facie skewing could in appropriate cases be shown to be illusory for the same reason that separates weighing States from non-weighing States: One of the *other* aggravating factors, usually an omnibus factor but conceivably another one, made it entirely proper for the jury to consider as aggravating the facts and circumstances underlying the invalidated factor.

We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighing States, see *supra*, at 5–6, if we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing

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added); cf. *post*, at 14–15 (BREYER, J., dissenting).

[5]This very problem may have been present in *Stringer* v. *Black*, *supra*. There, although the Mississippi courts invalidated an aggravating circumstance—whether the murder was "especially heinous, atrocious, or cruel," Miss. Code Ann. §99–19–101(h) (1993 Cum. Supp.)—that was *not* one of the specified eligibility factors, see §97–3–19(2) (1994), we nonetheless treated Mississippi as a weighing State. Since, however, Mississippi law provided that the jury could not impose a death sentence unless it found the existence of at least one statutory aggravating factor, see §99–19–101(3)(b) (1993 Cum. Supp.), it could be argued that the additional aggravating factors were converted into *de facto* eligibility factors.

process[6] *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

This test is not, as JUSTICE BREYER describes it, "an inquiry based solely on the admissibility of the underlying evidence." *Post*, at 15 (dissenting opinion). If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here. See *supra*, at 6; see also n. 6, this page.[7] The issue we confront is the skewing that could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty. See, *e.g.*, *Stringer*, 503 U. S., at 232 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."). As we have

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[6]There may be other distortions caused by the invalidated factor beyond the mere addition of an improper aggravating element. For example, what the jury was instructed to consider as an aggravating factor might have "actually . . . militate[d] in favor of a lesser penalty," *Zant*, *supra*, at 885. See *supra*, at 5–6.

[7]This explains the footnote in *Clemons* v. *Mississippi*, *supra*, at 754, n. 5, on which JUSTICE BREYER relies, see *post*, at 14. That footnote addressed petitioner's argument that the Mississippi Supreme Court had arbitrarily refused to order jury resentencing, even though it had done so in an earlier case, *Johnson* v. *State*, 511 So. 2d 1333 (1987), rev'd, 486 U. S. 578 (1988), on remand, 547 So. 2d 59 (1989). We distinguished the two cases, noting that in *Johnson*, "the jury was permitted to consider inadmissible evidence in determining the defendant's sentence," 494 U. S., at 754–755, n. 5, whereas in *Clemons*, "there is no serious suggestion that the State's reliance on the [invalid] factor led to the introduction of any evidence that was not otherwise admissible in either the guilt or sentencing phases of the proceeding," *id.*, at 755, n. 5. The crux of this distinction is that the sentencer's consideration of improper evidence is an error distinct from the one at issue here and in *Clemons*, to-wit, the jury's weighing in favor of death a factor that should not have been part of its calculus.

explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.

III

In California, a defendant convicted of first-degree murder is eligible for the death penalty if the jury finds one of the "special circumstances" listed in Cal. Penal Code Ann. §190.2 (West Supp. 2005) to be true. These are the eligibility factors designed to satisfy *Furman*. See *People* v. *Bacigalupo*, 6 Cal. 4th 457, 467–468, 862 P. 2d 808, 813 (1993). If the jury finds the existence of one of the special circumstances, it is instructed to "take into account" a *separate* list of sentencing factors describing aspects of the defendant and the crime. Cal. Penal Code Ann. §190.3 (West 1999). These sentencing factors include, as we have said, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding."

The Court of Appeals held that California is a weighing State because "'the sentencer [is] restricted to a "weighing" of aggravation against mitigation' and 'the sentencer [is] prevented from considering evidence in aggravation other than discrete, statutorily-defined factors.'" 373 F. 3d, at 1061 (brackets in original) (quoting *Williams* v. *Calderon*, 52 F. 3d 1465, 1478 (CA9 1995)). The last statement is inaccurate. The "circumstances of the crime" factor can hardly be called "discrete." It has the effect of rendering all the specified factors nonexclusive, thus causing California to be (in our prior terminology) a nonweighing State. Contrary to Sanders' contention, and JUSTICE STEVENS' views in dissent, the mere fact that the sentencing factors included "the existence of any special circumstances [eligibility factors] found to be true," Cal. Penal Code Ann. §190.3(a), did not make California a

weighing State. That fact was redendant for purposes of our weighing jurisprudence because it in no way narrowed the universe of aggravating facts the jury was entitled to consider in determining a sentence.[8] But leaving aside the weighing/non-weighing dichotomy and proceeding to the more direct analysis set forth earlier in this opinion: All of the aggravating facts and circumstances that the invalidated factor permitted the jury to consider were also open to their proper consideration under one of the other factors. The erroneous factor could not have "skewed" the sentence, and no constitutional violation occurred.

More specifically, Sanders' jury found four special circumstances to be true: that "[t]he murder was committed while the defendant was engaged in . . . Robbery," §190.2(a)(17)(A) (West Supp. 2005); that it was "committed while the defendant was engaged in . . . Burglary in the first or second degree," §190.2(a)(17)(G); that "[t]he victim [Allen] was a witness to a crime who was intentionally killed for the purpose of preventing . . . her testimony in any criminal . . . proceeding," §190.2(a)(10); and that "[t]he murder was especially heinous, atrocious, or cruel," §190.2(a)(14). The California Supreme Court set aside the burglary-murder special circumstance under state merger

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[8]JUSTICE STEVENS argues that §190.3(a) may have affected the jury's deliberations in other ways, but we rejected each of these theories in *Zant* v. *Stephens*, 462 U. S. 862 (1983). The possibility that the jury would "coun[t] the nature of the crime twice," *post*, at 2 (STEVENS, J., dissenting), if it were instructed to consider both the facts of the crime and the eligibility circumstances was present in *Zant*. The jury there was told it could take into account all relevant circumstances, but also—much like the jury here—was instructed to consider "'any of [the] statutory aggravating circumstances [*i.e.*, eligibility factors] which you find are supported by the evidence.'" 462 U. S., at 866. Likewise, the jury in *Zant* might have "give[n] greater weight," *post*, at 2 (STEVENS, J., dissenting), to the facts underlying the eligibility circumstances, but we explicitly held that any such effect "cannot fairly be regarded as a constitutional defect in the sentencing process." 462 U. S., at 889. See *infra*, at 11–12.

law because the instructions permitted the jury to find a burglary (and thus the burglary-murder special circumstance) based on Sanders' intent to commit assault, which is already an element of homicide, see *People* v. *Wilson*, 1 Cal. 3d 431, 439–440, 462 P. 2d 22, 27–28 (1969) (in banc). 51 Cal. 3d, at 517, 797 P. 2d, at 587. The court invalidated the "heinous, atrocious, or cruel" special circumstance because it had previously found that to be unconstitutionally vague. *Id.*, at 520, 797 P. 2d, at 589 (citing *People* v. *Superior Court*, 31 Cal. 3d 797, 647 P. 2d 76 (1982)).

As the California Supreme Court noted, however, "the jury properly considered two special circumstances [eligibility factors] (robbery-murder and witness-killing)." 51 Cal. 3d, at 520, 797 P. 2d, at 589–590. These are sufficient to satisfy *Furman*'s narrowing requirement, and alone rendered Sanders eligible for the death penalty. Moreover, the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors. See 51 Cal. 3d, at 521, 797 P. 2d, at 590.

Sanders argues that the weighing process was skewed by the fact that the jury was asked to consider, as one of the sentencing factors, "the existence of any special circumstances [eligibility factors] found to be true." Cal. Penal Code Ann. §190.3(a) (West 1999). In Sanders' view, that placed special emphasis upon those facts and circumstances relevant to the invalid eligibility factor. Virtually the same thing happened in *Zant*. There the Georgia jury was permitted to "'conside[r] all evidence in extenuation, mitigation and aggravation of punishment.'" 462 U. S., at

871–872 (quoting *Zant* v. *Stephens*, 250 Ga. 97, 99–100, 297 S. E. 2d 1, 3–4 (1982)), but also instructed specifically that it could consider "'any of [the] statutory aggravating circumstances which you find are supported by the evidence,'" 462 U. S., at 866. This instruction gave the facts underlying the eligibility factors special prominence. Yet, even though one of the three factors (that the defendant had "substantial history of serious assaultive convictions," *id.*, at 867) was later invalidated, we upheld the sentence. We acknowledged that the erroneous instruction "might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given," *id.*, at 888; indeed, we *assumed* such an effect, *ibid.* But the effect was "merely a consequence of the statutory label 'aggravating circumstanc[e].'" We agreed with the Georgia Supreme Court that any such impact was "'inconsequential,'" *id.*, at 889, and held that it "cannot fairly be regarded as a constitutional defect in the sentencing process," *ibid.* The same is true here.

* * *

Because the jury's consideration of the invalid "special circumstances" gave rise to no constitutional violation, the Court of Appeals erred in ordering habeas relief. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–980

JILL L. BROWN, WARDEN, PETITIONER *v.* RONALD L. SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 11, 2006]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

Our prior cases have drawn a simple categorical distinction between a nonweighing State and a weighing State. In the former, the sole function of an aggravating circumstance finding is to make the defendant eligible for the death penalty. See, *e.g.*, *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983) ("[I]n Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion [to impose the death penalty], apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty"). In the latter, such a finding performs a second function—it provides a reason for deciding to impose that sentence on an eligible defendant. See, *e.g.*, *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990) ("In Mississippi, unlike the Georgia scheme considered in *Zant*, the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances").

Thus, in a nonweighing State, the finding of four aggravating circumstances has the same legal significance as a finding of three, and invalidation of one is presumptively harmless. See *Stringer* v. *Black*, 503 U. S. 222, 232 (1992)

("In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty"). By contrast, when a jury is told to weigh aggravating circumstances against mitigating evidence in making its penalty decision, four aggravators presumptively are more weighty than three. *See ibid.* ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"). For example, when a jury, as here, is incorrectly informed that its finding that a killing was "heinous, atrocious, or cruel" provides a reason for imposing death, *see generally* Cal. Penal Code Ann. §190.2(a)(14) (West Supp. 2005), that error may well affect the jury's deliberations. Having been told to weigh "[t]he circumstances of the crime . . . *and* the existence of any [aggravating] circumstances found to be true," §190.3(a) (West 1999) (emphasis added), the jury may consider its conclusion that the killing was heinous separately from the "circumstances of the crime" underlying that erroneous conclusion, improperly counting the nature of the crime twice in determining whether a sentence of death is warranted. Or the jury, recognizing that the legislature has decided that a "heinous, atrocious, or cruel" murder, without more, can be worthy of the death penalty, may consider this a legislative imprimatur on a decision to impose death and therefore give greater weight to its improper heinousness finding than the circumstances of the crime would otherwise dictate. Under either scenario a weight has been added to death's side of the scale, and one cannot presume that this weight made no difference to the jury's ultimate conclusion.

There are, of course, different weighing systems. If a jury is told that only those specific aggravating circum-

stances making the defendant eligible for the death penalty may provide reasons for imposing that penalty, its consideration of an invalid factor is obviously more prejudicial than if the jury is told that it may also consider all of the circumstances of the crime. The fact that California sentencing juries may consider these circumstances increases the likelihood that their consideration of a subsequently invalidated aggravating circumstance will be harmless, but it does not take California out of the "weighing State" category.

The majority, however, has decided to convert the weighing/nonweighing distinction from one focused on the role aggravating circumstances play in a jury's sentencing deliberations to one focused on the evidence the jury may consider during those deliberations. Compare *Stringer*, 503 U. S., at 229 (explaining that Mississippi is a weighing State because the jury must weigh aggravating circumstances against mitigating evidence in choosing whether to impose the death penalty, while Georgia is a nonweighing State because "aggravating factors as such have no specific function in [that] decision"), with *ante*, at 7–8 ("An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances" (footnote omitted)). But whether an aggravating circumstance finding plays a role in the jury's decision to impose the death penalty has nothing to do with whether the jury may separately consider "all the 'circumstances of the crime.'"

In this case, if the question had been presented to us, I might well have concluded that the error here was harmless. See generally *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993). But the State has merely asked us to decide whether California is a weighing State, see Pet. for Cert. i,

and the Court of Appeals correctly decided that the statutory text has unambiguously answered that question. Cf. §190.3 (enumerating aggravating and mitigating circumstances and requiring "the trier of fact [to] impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances").

Instead of heeding this plain language, the Court has chosen to modify our settled law, ignoring the dual role played by aggravating circumstances in California's death penalty regime. Because this decision is more likely to complicate than to clarify our capital sentencing jurisprudence, I respectfully dissent.

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[January 11, 2006]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The question before us is whether California's approach to imposing the death penalty makes California a "weighing" or a "nonweighing" State for purposes of determining whether to apply "harmless-error" review in a certain kind of death case—namely a case in which the death sentence rests in part on an invalid aggravating circumstance. In my view, it does not matter whether California is a "weighing" or a "nonweighing" State, as ordinary rules of appellate review should apply. A reviewing court must find that the jury's consideration of an invalid aggravator was harmless beyond a reasonable doubt, regardless of the form a State's death penalty law takes.

I

To understand my answer, one must fully understand the question, including the somewhat misleading terminology in which the question is phrased.

A

Death penalty proceedings take place in two stages. At the first stage, the jury must determine whether there is something especially wrongful, *i.e.*, "aggravating," about the defendant's conduct. State statutes typically list these specific "aggravating" factors, and the jury typically must

find at least one such factor present for the defendant to become eligible for the death penalty. "By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition," as required by the Eighth Amendment. *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988). If the jury finds that an aggravating factor is present and the defendant is consequently eligible for the death penalty, it proceeds to Stage Two. At Stage Two, the jury (or sometimes the judge) must determine whether to sentence the defendant to death or to provide a different sentence (usually, life imprisonment). At this stage, this Court has said, States divide as to their approach.

Weighing States. Some States tell the jury: "Consider all the mitigating factors and weigh them against the *specific aggravating factors* that you found, at Stage One, made the defendant eligible for the death penalty. If the aggravating factors predominate, you must sentence the defendant to death; otherwise, you may not." Because the law in these States tells the jury to weigh *only* statutory aggravating factors (typically the same factors considered at Stage One) against the mitigating factors, this Court has called these States "weighing States." This is something of a misnomer because the jury cannot weigh everything but is instead limited to weighing certain statutorily defined aggravating factors. The Court has identified Mississippi as a classic example of a weighing State. See *Stringer* v. *Black*, 503 U. S. 222, 229 (1992).

Nonweighing States. Other States tell the jury: "Consider all the mitigating factors and weigh them, not simply against the statutory aggravating factors you previously found at Stage One, but against *any and all* factors you consider aggravating." Because the balance includes *all* aggravating factors and not only those on the Stage One eligibility list, this Court has called such States "nonweighing States." Although it might be clearer to call

these States "complete weighing" States (for the jury can weigh *everything* that is properly admissible), I shall continue to use the traditional terminology. The Court has identified Georgia as the prototypical example of a State that has adopted this complete weighing approach. *Ibid.*

B

The question in this case arises under the following circumstances.

(1) At Stage One, a jury found several aggravating factors, the presence of any one of which would make the defendant eligible for the death penalty.

(2) At least one of those aggravating factors was an "improper" factor, *i.e.*, a factor that the law forbids the jury from considering as aggravating and that the jury's use of which (for this purpose) was later invalidated on appeal. The sentencing court made a mistake, indeed a mistake of constitutional dimensions, when it listed the "heinous, atrocious, or cruel", Cal. Penal Code Ann. §190.2(a)(14) (West Supp. 2005), aggravating factor as one of the several factors for the jury to consider at Stage One. See *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980) (plurality opinion). But that mistake did not, in and of itself, forbid application of the death penalty. After all, the jury also found *other* listed aggravating factors, the presence of any one of which made the defendant *eligible* for the death penalty.

(3) All the evidence before the sentencing jury at Stage Two was properly admitted. The evidence that supported the improper heinousness factor, for example, also showed how the crime was committed, and the jury is clearly entitled to consider it.

Given this outline of the problem, two questions follow. *Question One:* Is it possible that the judge's legal mistake at Stage One—telling the jury that it could determine

that the "heinous, atrocious, and cruel" aggravator was present—prejudiced the jury's decisionmaking at Stage Two? In other words, could that mistake create harmful error, causing the jury to impose a death sentence due to the fact that it was told to give special weight to its heinousness finding? The lower courts have read this Court's opinions to say that in a nonweighing State the answer *must* be "no"; but in a weighing State the answer *might* be "yes."

Question Two: Given the lower courts' answer to Question One, is California a nonweighing State? If so, the reviewing court can assume, without going further, that the error arising out of the sentencing judge's having listed an invalid aggravator was harmless. Or is California a weighing State? If so, the reviewing court should have gone further and determined whether the error was *in fact* harmless.

I would answer Question Two by holding that the lower courts have misunderstood this Court's answer to Question One. Despite the Court's occasional suggestion to the contrary, the weighing/nonweighing distinction has little to do with the need to determine whether the error was harmless. Moreover, given "the 'acute need' for reliable decisionmaking when the death penalty is at issue," *Deck* v. *Missouri*, 544 U. S. ___, ___ (2005) (slip op., at 10), reviewing courts should decide if that error was harmful, regardless of the form a State's death penalty law takes.

II

To distinguish between weighing and nonweighing States for purposes of determining whether to apply harmless-error analysis is unrealistic, impractical, and legally unnecessary.

A

Use of the distinction is unrealistic because it is unre-

lated to any plausible conception of how a capital sentencing jury actually reaches its decision. First, consider the kind of error here at issue. It is not an error about the improper admission of evidence. See *infra*, at 12–14. It is an error about the importance a jury might attach to certain admissible evidence. Using the metaphor of a "thumb on death's side of the scale," we have identified the error as the "possibility not only of randomness but also of bias in favor of the death penalty." *Stringer* v. *Black*, 503 U. S., at 236; see *Sochor* v. *Florida*, 504 U. S. 527, 532 (1992) ("Employing an invalid aggravating factor in the weighing process creates the possibility of randomness by placing a thumb on death's side of the scale, thus creating the risk of treating the defendant as more deserving of the death penalty" (citations and alterations omitted)).

Second, consider why that error could affect a decision to impose death. If the error causes harm, it is because a jury has given special weight to its finding of (or the evidence that shows) the invalid "aggravating factor." The jury might do so because the judge or prosecutor led it to believe that state law attaches particular importance to that factor: Indeed, why else would the State call that factor an "aggravator" and/or permit it to render a defendant death eligible? See *Zant* v. *Stephens*, 462 U. S. 862, 888 (1983) (recognizing that statutory label "arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given"); see also *ante*, at 2 (STEVENS, J., dissenting) (noting that jury may consider the aggravating label "a legislative imprimatur on a decision to impose death and therefore give greater weight to its improper heinousness finding . . ."); *Clemons* v. *Mississippi*, 494 U. S. 738, 753, 755 (1990) (noting that the prosecutor "repeatedly emphasized and argued the 'especially heinous' factor during the sentencing hearing" and remanding for the Mississippi Supreme Court to conduct harmless-error review).

The risk that the jury will give greater weight at Stage Two to its Stage One finding of an aggravating factor—a factor that, it turns out, never should have been found in the first instance—is significant in a weighing State, for the judge will explicitly tell the jury to consider that particular aggravating factor in its decisionmaking process. That risk may prove significant in a nonweighing State as well, for there too the judge may tell the jury to consider that aggravating factor in its decisionmaking process.

The only difference between the two kinds of States is that, in the nonweighing State, the jury can also consider other aggravating factors (which are usually not enumerated by statute). Cf. Ga. Code Ann. §17–10–30(b) (2004) (judge or jury "shall consider . . . any mitigating circumstances or aggravating circumstances otherwise authorized by law *and any of the following statutory aggravating circumstances* which may be supported by the evidence" (emphasis added)). But the potential for the same kind of constitutional harm exists in both kinds of States, namely that the jury will attach special weight to that aggravator on the scale, the aggravator that the law says should not have been there.

To illustrate this point, consider the following two statements. *Statement One*—The judge tells the jury in a weighing State: "You can sentence the defendant to death only if you find one, or more, of the following three aggravating circumstances, X, Y, or Z. If you do, the law requires you to consider those aggravators and weigh them against the mitigators." *Statement Two*—The judge tells the jury in a nonweighing State: "You can sentence the defendant to death only if you find one, or more, of the following three aggravating circumstances, X, Y, or Z. If you do, the law permits you to consider all mitigating and aggravating evidence, including X, Y, and Z, in reaching your decision."

What meaningful difference is there between these two

statements? The decisionmaking process of the first jury and that of the second jury will not differ significantly: Both juries will weigh the evidence offered in aggravation and the evidence offered in mitigation. Cf. Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 4 ("In reality, all sentencers 'weigh'"). If Statement One amounts to harmful error because the prosecutor emphasized the importance of wrongfully listed factor Y, why would Statement Two not amount to similarly harmful error? In both instances, a jury *might* put special weight upon its previous finding of factor Y. It is not surprising that commentators have found unsatisfactory the Court's efforts to distinguish between the two statements for harmless-error purposes. See, *e.g.*, Steiker & Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 386–387 (1995) ("[T]he different doctrinal approaches to 'weighing' and 'non-weighing' schemes are difficult to justify given that the sentencer's decisionmaking process is likely to be similar under either scheme"); Widder, Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial, 68 Tulane L. Rev. 1341, 1363–1364, 1365 (1994) (arguing that the distinction is largely an "illusion" that "appears to be derived from a fixation on the literal meaning of the metaphor of weighing, [which] remains a common means of describing the capital sentencing process even in decisions of state courts that rely on the non-weighing status of their statutory schemes to uphold death sentences resting on invalid factors").

B

The distinction is impractical to administer for it creates only two paradigms—States that weigh *only* statutory aggravators and States that weigh any and all circumstances (*i.e.*, statutory and nonstatutory aggravators).

Many States, however, fall somewhere in between the two paradigms. A State, for example, might have a set of aggravating factors making a defendant eligible for the death penalty and an additional set of sentencing factors (unrelated to the eligibility determination) designed to channel the jury's discretion. California is such a State, as it requires the jury to take into account the eligibility-related aggravating factors and 11 other sentencing factors—including an omnibus factor that permits consideration of all of the circumstances of the crime. Cal. Penal Code Ann. §190.3 (West 1999). And because many States collapse Stage One (eligibility) and Stage Two (sentence selection) into a single proceeding in which the jury hears all of the evidence at the same time, those States permit the prosecution to introduce and argue any relevant evidence, including evidence related to the statutory aggravators. Indeed, one State the Court has characterized as a weighing State (Mississippi) and one State the Court has characterized as a nonweighing State (Virginia) both fall into this intermediate category. Miss. Code Ann. §99–19–101 (2000); Va. Code Ann. §19.2–264.4(B) (Lexis 2004). Efforts to classify these varied schemes, for purposes of applying harmless-error analysis, produce much legal heat while casting little light.

C

Our precedents, read in detail, do not require us to maintain this unrealistic and impractical distinction. The Court has discussed the matter in three key cases. In the first case, *Zant* v. *Stephens*, the Court considered an error that arose in Georgia, a nonweighing State. The Georgia Supreme Court had held that one of several statutory aggravating circumstances found by the jury—that the defendant had a "'substantial history of serious assaultive criminal convictions'"—was unconstitutionally vague. 462 U. S., at 867, and n. 5. The jury, however, had also found

other aggravators present, so the defendant remained eligible for death. The Georgia Supreme Court concluded that the sentencing court's instruction on the unconstitutional factor, though erroneous, "had 'an inconsequential impact on the jury's decision regarding the death penalty.'" *Id.*, at 889 (quoting *Zant* v. *Stephens*, 250 Ga. 97, 100, 297 S. E. 2d 1, 4 (1982)).

This Court agreed with the Georgia Supreme Court's conclusion. The Court conceded that the label—"aggravating circumstance"—created the risk that the jury *might* place too much weight on the evidence that showed that aggravator. Indeed, it said that the statutory label "'aggravating circumstances'" might "arguably . . . have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given." 462 U. S., at 888. But the Court concluded that, under the circumstances, the error was harmless. For one thing, Georgia's statute permitted the jury to consider more than just the specific aggravators related to Stage One. See *id.*, at 886. For another thing, the trial court's "instructions did not place particular emphasis on the role of statutory aggravating circumstances in the jury's ultimate decision." *Id.*, at 889 (citation omitted). In fact, it specifically told the jury to "'consider *all* facts and circumstances presented in ext[e]nuation . . ., mitigation and aggravation.'" *Ibid.* Finally, there was no indication at all that either the judge or the prosecutor tried to single out the erroneous aggravator for special weight. Because under the circumstances there was no real harm, the Court concluded that "any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process." *Ibid.*

The Court in *Zant* did not say that the jury's consideration of an improper aggravator is *never* harmless in a State like Georgia. It did say that the jury's consideration of the improper aggravator was harmless *under the circumstances of that case*. And the Court's detailed discus-

sion of the jury instructions is inconsistent with a rule of law that would require an *automatic* conclusion of "harmless error" in States with death penalty laws like Georgia's. See *id.*, at 888–889, and n. 25; see also *id.*, at 891 ("Under Georgia's sentencing scheme, *and under the trial judge's instructions in this case*, no suggestion is made that the presence of more than one aggravating circumstance should be given special weight" (emphasis added)).

The dissent in *Zant* also clearly understood the principal opinion to have conducted a harmless-error analysis. *Id.*, at 904–905 (opinion of Marshall, J., joined by Brennan, J.). And the Court repeated this same understanding in a case decided only *two weeks later*. *Barclay* v. *Florida*, 463 U. S. 939, 951, n. 8 (1983) (plurality opinion) (upholding death sentence and concluding that "we need not apply the type of federal harmless-error analysis that was necessary in *Zant*").

The second case, *Clemons* v. *Mississippi*, involved a weighing State, Mississippi. The Mississippi Supreme Court upheld the petitioner's death sentence "even though the jury instruction regarding one of the aggravating factors pressed by the State, that the murder was 'especially heinous, atrocious, or cruel,' was constitutionally invalid." 494 U. S., at 741. Finding it unclear whether the state court reweighed the aggravating and mitigating evidence or conducted harmless-error review, the Court vacated and remanded to the Mississippi Supreme Court to conduct either procedure (or to remand to a sentencing jury) in the first instance. *Id.*, at 754.

As far as the Court's "harmless-error" analysis reveals, the reason the Court remanded—the reason it thought the error might not be harmless—had nothing to do with the fact that Mississippi was a so-called weighing State. Cf. *ante*, at 5, n. 3. Rather, the Court thought the error might be harmful because "the State repeatedly emphasized and argued the 'especially heinous' factor during the sentenc-

ing hearing," in stark contrast to the "little emphasis" it gave to the other valid aggravator found by the jury. 494 U. S., at 753. The Court concluded that, "[u]nder these circumstances, it would require a detailed explanation based on the record for us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." *Id.*, at 753–754.

The third case, *Stringer* v. *Black*, presented a different kind of question: For the purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989), does the rule that a vague aggravating circumstance violates the Eighth Amendment apply to a weighing State like Mississippi in the same way it applies to a nonweighing State like Georgia? The Court answered this question "yes." In so doing, it described the difference between Mississippi's system and Georgia's system as follows:

> "*In a nonweighing State so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings.* But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." 503 U. S., at 232 (emphasis added).

The first sentence in this statement is the first and only suggestion in our cases that the submission of a vague aggravating circumstance to a jury can *never* result in constitutional error in a nonweighing State. Indeed, the term "nonweighing State," and the significance attached to it, does not appear in the Court's jurisprudence prior to *Stringer*. The second sentence in the statement is less categorical than the first. It suggests that a state appellate court would have to make some form of a harmless-error inquiry to satisfy itself that the invalidated factor "would not have made a difference to the jury's determination" before it could conclude that there was "no constitutional violation." *Ibid.* Given this errant language in *Stringer*, I agree that it is "[n]ot surprisin[g]" that the lower courts have since operated under the assumption "that different rules apply to weighing and non-weighing States," and that harmless-error review is necessary only in the former. *Ante*, at 5, n. 3. My point is simply that such an assumption is unfounded based on our prior cases. And regardless of the lower courts' interpretation of our precedents, I think it more important that our own decisions have not repeated *Stringer*'s characterization of those precedents. See, *e.g.*, *Tuggle* v. *Netherland*, 516 U. S. 10, 11 (1995) *(per curiam)* (characterizing *Zant* as holding "that a death sentence supported by multiple aggravating circumstances *need not always* be set aside if one aggravator is found to be invalid" (emphasis added)).

For the reasons stated in Parts II–A and II–B, *supra*, I would not take a single ambiguous sentence of dicta and derive from it a rule of law that is unjustified and that, in cases where the error is in fact harmful, would deprive a defendant of a fair and reliable sentencing proceeding.

III

The upshot is that I would require a reviewing court to examine whether the jury's consideration of an unconsti-

tutional aggravating factor was harmful, regardless of whether the State is a weighing State or a nonweighing State. I would hold that the fact that a State is a nonweighing State may make the possibility of harmful error less likely, but it does not excuse a reviewing court from ensuring that the error was *in fact* harmless. Our cases in this area do not require a different result.

IV

The Court reaches a somewhat similar conclusion. It, too, would abolish (or at least diminish the importance of) the weighing/nonweighing distinction for purposes of harmless-error analysis. But then, surprisingly, it also diminishes the need to conduct any harmless-error review at all. If all the evidence was properly admitted and if the jury can use that evidence when it considers other aggravating factors, any error, the Court announces, must be harmless. See *ante*, at 7 (holding that when "one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances" that underlie the invalidated aggravating factor, a reviewing cc art need not apply harmless-error review).

Common sense suggests, however, and this Court has explicitly held, that the problem before us is *not* a problem of the admissibility of certain evidence. It is a problem of the emphasis given to that evidence by the State or the trial court. If that improper emphasis is strong enough, it can wrongly place a "thumb on death's side of the scale" at Stage Two (sentencing). That is what the Court *said* in *Stringer*, that is what the Court *necessarily implied* in *Zant*, and that is what the Court *held* in *Clemons*. I believe the Court is right to depart from the implication of an errant sentence in *Stringer*. But it is wrong to depart without explanation from *Clemons'* unanimous holding—a holding that at least two Members of this Court have explicitly recognized as such. See *Pensinger* v. *California*,

502 U. S. 930, 931 (1991) (O'CONNOR, J., joined by KENNEDY, J., dissenting from denial of certiorari) (noting that the "'especially heinous' instruction did not change the mix of evidence presented to the jury in *[Clemons]*" and "that fact alone did not support a finding of harmlessness").

The Court cannot reconcile its holding with *Clemons*. That opinion makes clear that the issue is one of emphasis, not of evidence. Indeed, the Court explicitly disavowed the suggestion that Mississippi's "reliance on the 'especially heinous' factor led to the introduction of any evidence that was not otherwise admissible in either the guilt or sentencing phases of the proceeding. All of the circumstances surrounding the murder already had been aired during the guilt phase of the trial and a jury clearly is entitled to consider such evidence in imposing [the] sentence." 494 U. S., at 754–755, n. 5. And the entire Court agreed that the potentially improper emphasis consisted of the fact that "the State repeatedly emphasized and argued the 'especially heinous' factor during the sentencing hearing," while placing "little emphasis" on the sole valid aggravator of robbery for pecuniary gain. *Id.*, at 753–754; see also *id.*, at 773, n. 23 (Blackmun, J., joined by Marshall and STEVENS, JJ., concurring in part and dissenting in part).

The Court's only answer is to assert that "*Clemons* maintains the distinction envisioned in *Zant*." *Ante*, at 6, n. 3 (citing *Clemons*, *supra*, at 745). But *Clemons* did no such thing. Although the Court did observe the differences between the statutory schemes of Georgia and Mississippi, it certainly did not, as the Court claims, suggest that harmless-error analysis should *never* be conducted in the former and *always* be conducted in the latter. Rather, the Court made the unremarkable statement that "[i]n a State like Georgia, where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of

one aggravating circumstance *does not necessarily* require an appellate court to vacate a death sentence and remand to a jury." *Clemons*, *supra*, at 744–745 (emphasis added). Of course, the implication of the qualifier "necessarily" is that, in some cases, a jury's consideration of an invalidated aggravating circumstance *might* require that a death sentence be vacated, even "[i]n a State like Georgia."

In sum, an inquiry based solely on the admissibility of the underlying evidence is inconsistent with our previous cases. And as explained above, see *supra*, at 5–7, the potential for a tilting of the scales toward death is present even in those States (like Georgia and Virginia) that permit a jury to consider all of the circumstances of the crime.

V

It may well be that the errors at issue in this case were harmless. The State of California did not ask us to consider the Ninth Circuit's contrary view, and I have not done so. Given the fact that I (like the Court in this respect) would abolish the weighing/nonweighing distinction, and in light of the explanation of the kind of error at issue, I would remand this case and require the Ninth Circuit to reconsider its entire decision in light of the considerations I have described.